Supreme Court, U.S.
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No. 08-594

IN THE

Supreme Court of the United States

RICHARD PREIS and VICTORIA HEARIN PREIS,
Petitioners,

v.

LEXINGTON INSURANCE COMPANY, T&B, LTD. d/b/a THAMES, BATRE, MATTEI, BEVILLE & ISON, and ALLEN LADD,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the district court erred by not properly instructing the jury that the insurer who issued an "all risk" insurance policy has the burden of proof to prove that water damaged the walls of the Petitioners' house during Hurricane Katrina, and absent the insurer meeting this burden with specific evidence, the insured is to prevail on the coverage claim?

II. Whether a federal flood insurance settlement agreement arising from the same hurricane occurrence can be introduced as evidence by Lexington Insurance Company, the wind damage insurer, to prove that water caused the damage to the property based upon the restrictions of Fed. R. Evid. Rule 408?

III. Whether an insurance adjuster, who has no personal knowledge of the cause of the damages to a house from a hurricane and who has not been qualified as an expert under *Daubert*, can testify at trial as to the cause of the damage to Petitioners' house? *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed.2d 469 (1993); Fed. R. Evid. 701 and 702.

PARTIES TO THE PROCEEDING

Petitioners, Richard Preis and Victoria Hearin Preis, were plaintiffs at the district court and appellants at the appellate court.

Respondents, Lexington Insurance Company, T&B, Ltd. d/b/a Thames Batre Mattei Beville & Ison, and Allen Ladd, were defendants at the district court and appellees at the appellate court. Lexington Insurance Company is the insurance company. T&B, Ltd. d/b/a Thames Batre Mattei Beville & Ison is the insurance agency. Allen Ladd is Preis' insurance agent. This Petition for Writ of Certiorari only relates to claims against Lexington Insurance Company.

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RICHARD PREIS and VICTORIA HEARIN PREIS,
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LEXINGTON INSURANCE COMPANY, T&B, LTD. d/b/a THAMES, BATRE, MATTEI, BEVILLE & ISON, and ALLEN LADD,
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is an unpublished opinion reported as *Preis et al. v. Lexington Insurance Company et al.*, on June 3, 2008 at 2008 WL 2247140 (11th Cir. 2008) and is reprinted in the Appendix at App. C, page 6a.[1] The opinion of the United States District Court for the Southern District of Alabama, Southern Division, granting in part and denying in part Lexington Insurance Company's motion for

[1] Petitioners' Appendix is cited herein as "App.".

partial summary judgment and denying Preis' motion for summary judgment, is a published decision reported at 508 F.Supp.2d 1061 (U.S.D.C. Al. 2007) and is reprinted at App. O, page 176a.

JURISDICTION

The Court of Appeals for the Eleventh Circuit issued its opinion on June 3, 2008. App. C, page 6a. Petitioners sought rehearing and rehearing *en banc*. The Court denied rehearing and rehearing *en banc* on August 4, 2008. App. D, page 16a. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Fed. R. Evid. 408 provides:

> Rule 408. Compromise and Offers to Compromise
>
> (a) Prohibited uses.—Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:
>
> (1) furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and
>
> (2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

(b) Permitted uses.—This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

Fed. R. Evid. 408 is reprinted at App. F, page 19a.

Fed. R. Evid. 701 provides:

Rule 701 Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Fed. R. Evid. 701 is reprinted at App. G, page 20a.

Fed. R. Evid. 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702 is reprinted at App. H, page 21a.

This case also involves Fed. R. Civ. P. 51 and the implementation of proper jury instructions by a district court. Fed. R. Civ. P. 51 is reprinted at App. I, page 22a.

STATEMENT OF THE CASE

On August 29, 2005, the home of Richard and Victoria Preis ("Petitioners") located on Mobile Bay at Point Clear, Alabama was completely destroyed by Hurricane Katrina. On March 8, 2006, Petitioners filed a Complaint for Declaratory Judgment, Damages, and Penalties against Defendants, Lexington Insurance Company ("Lexington"), T & B, Ltd. d/b/a Thames, Batré, Mattei, Beville, and Ison ("Thames Batre"), and Allen Ladd ("Ladd"). A jury trial was held on August 13-15, 2007. App. A, page 1a; App. P-R, pages 206a-322a. Two structural walls of the house were damaged during the hurricane requiring the house to be completely demolished. Despite the extensive damage to the house resulting in a replacement cost of $1,200,000, the jury awarded Petitioners $70,000. App. B, page 5a. The determination of the amount of the jury award was based upon whether wind or water caused the damage to the structural walls of the house. Prior to trial, all parties had agreed that the damages caused by water were not covered under the Lexington policy. Lexington argued and convinced the jury Petitioners had not met their burden of proof in establishing that the walls to the house were damaged by wind based upon the erroneous jury instruction of the district court. In fact, the district court should have instructed the jury that Lexington has the burden of proof by the preponderance of the evidence to established that water caused the damage to the walls of the house, which is excluded from the policy.

No event has resulted in more catastrophic property damage in the Gulf Coast Region than Hurricane Katrina. The clear delineation of the legal issues relating to jury trials of hurricane insurance coverage cases is of the highest national importance and priority. This is the first hurricane jury trial case which could be reviewed by this Court. Because of the national impact of insuring hurricane damage and the number of disputes between insurers and insureds relating to the cause of damage to property during a hurricane, it is of critical importance this Court review this case and rule on these issues.

The Eleventh Circuit granted oral argument on May 23, 2008 because of the importance of these issues, which are the subject of this brief. On June 3, 2008, in a per curiam opinion, a three judge Panel of the Eleventh Circuit ("the Panel") rejected Petitioners' arguments and affirmed the rulings of the district court. App. C, page 6a. In this per curiam opinion, which was unpublished by the Panel, the appellate court rejected Petitioners' arguments and held that the evidentiary rulings of the district court were not in error. The per curiam opinion contained three major errors of law. Petitioners filed a petition for rehearing and rehearing *en banc* based on the three errors which are the subject of this writ. The petition for rehearing and rehearing *en banc* were denied on August 4, 2008. App. D, page 16a. The original opinion of the Eleventh Circuit was issued as mandate on August 12, 2008. App. E, page 18a.

In most hurricane cases that will be tried to a jury between a insurer and the insured, the question of whether water or wind caused the damage to the property will be the primary factual issue. In most instances, no one is present at the damaged property

and the jury must rely on expert testimony to make this determination of the cause of the damages to the property. Both experts agreed in this case on one principle—the maximum wind in hurricanes arrives prior to the maximum storm surge. This makes the determination of the cause of the damage that much more difficult because the storm surge erases the evidence of the wind damage. Because of the contested nature of the expert testimony, the outcome of the case will often turn on who has the burden of proof on the cause of the damage to the property. The court's instructions to the jury, in the context of the trial of a hurricane case, is of critical importance. It is for this reason this writ should be granted to set rules and guidelines for the court's administration of jury trials involving the insurer and insured in hurricane cases.

Three legal issues relating to the "cause" of the damage to the house from Katrina arose during the trial. The first issue relates the burden of proof on the cause of the loss to the property when the insurer has issued an "all risk" policy. The court mistakenly instructed the jury that the plaintiff homeowner had the burden of proof to prove "***that their claim is within its coverage, and the amount of their covered damage.***"[2] This is clearly contrary to the long established line of cases in all circuits, including the Eleventh Circuit, which holds the insurer has the burden of proof to prove that the force of the water damaged the two structural walls in the house resulting it its demolition. All of the federal courts including the Second, Fifth, and Tenth Circuit have properly defined the burden of proof an "all risk"

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[2] App. R, p. 322a, ll. 21-25. (Emphasis added.)

policy in non-hurricane cases. *Dow Chemical Co. v. Royal Indem. Co.* 635 F.2d 379, 386 (5th Cir. 1981); *Leprino Foods Co. v. Factory Mut. Ins. Co.*, 453 F.3d 1281 (10th Cir. 2006); *International Multifoods Corp. v. Commercial Union Ins. Co*, 309 F.3d 76, 84 (2nd Cir. 2002); *North American Foreign Trading Corp. v. Mitsui Sumitomo Ins. USA, Inc.*, 499 F.Supp.2d 361, 374 (S.D.N.Y. 2007). While the Eleventh Circuit has adopted the same rules as the other circuits on "all risk" policies, it improperly instructed the jury on the application of the burden of proof involving exclusions under "all risk" policies on the loss in hurricane cases. *National Union Fire Ins. Co. of Pa. v. Carib Aviation, Inc.*, 759 F.2d 873, 875 (11th Cir.1985). The ruling in this case that the insured has the burden of proof on the cause of damages to the property when the insurer has issued an all risk policy represents a significant departure from the rules followed in all circuits in the United States in non-hurricane cases.

During oral arguments before the Panel, the Panel refused to accept the legal proposition that Petitioners were only required to prove the house walls were destroyed during the hurricane and that it was the insurer's burden, by a preponderance of evidence, to show the walls were destroyed by water.[3] Petitioners met their burden of proof by showing the walls were destroyed and it was the insurer's burden to show the cause of the damage to the walls. That is the essence of an "all risk" insurance policy.

A clear delineation of these issues is required for purposes of future jury trials on hurricane cases.

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[3] If this was a "perils" policy, Petitioners would be required to prove the walls were destroyed by a covered peril—the wind.

Because all parties acknowledge that the policy in question in this case is an "all risk" policy, the Supreme Court should address the different burdens of proof in an "all risk" policy and the "perils" policy and address the level of the burden of proof of the insurer.[4] This Court should provide comprehensive instructions on the burden of proof a district court should give to a jury when no witnesses are present when an "all risk" policy has insured the loss.

The second issue relates to the error committed at trial by allowing the wind insurer to introduce the federal flood insurance .settlement agreement in violation of Fed. R. Evid. 408 for the sole purpose of proving the water rather than the wind caused the damage to the property. Petitioners settled with the flood insurer prior to the trial with Lexington. Over the objection of Petitioners, the court allowed the federal flood insurer settlement agreement into evidence despite the specific prohibitions under Rule 408 and the numerous cases not allowing its introduction. This was clearly prejudicial to Petitioners and became Lexington's primary defense theme.

The third issue relates to the district court allowing insurance adjusters to testify as to the cause of the damage when they had no first hand knowledge of the cause of the damage and had not be qualified as experts pursuant to Rules 701 and 702 of the Federal Rules of Evidence. The court disregarded the gatekeeper requirements of *Daubert* in allowing this type of opinion testimony to be presented to the jury.

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[4] Lexington argued before the district court and the appellate court the burden of proof as to what caused the loss to the property for a perils policy and all risk policy were in fact the same.

Insurers are denying coverage in hurricane cases based upon the failure of any court to fully and comprehensively address the high burden of proof of the insurer arising from "all risk" policies. Most circuits have conclusively resolved these high burdens of proof on "all risk" policies in non-hurricane cases. The Supreme Court should take this opportunity to set forth specific jury instructions and rules of evidence, which fully and in detail set forth the interplay in the burden of proof of "all risk" policies, use of insurance adjusters as expert witnesses, and the prohibitions on the introduction of federal flood insurance settlement agreements to prove the cause of damages to the property. These issues are recurring in all hurricane cases. No case currently exists addressing the interplay of these important "causation" issues and unless the United States Supreme Court accepts this case for review, none will exist in the immediate future. Because of the lack of authority by the courts and the need for uniformity of the courts in the Gulf Coast and Atlantic Coast areas in addressing the issue of property damage from hurricanes, insurers like Lexington will continue to control the relationship between the insurer and insured based solely upon this uncertainty.

A clear delineation of the insurer's burden of proof relating to the cause of the damage will balance the scales of justice in these type of cases, and remove the issue of who has the most economic resources to litigate the case as the primary factor that tips those scales in favor of the insurer. Without a clear delineation of the interplay of these important issues, the hurricane cases will evolve into a matter of who has the most money to hire experts, and the insurer will win in most instances because of the uncertainty of the law on causation and the lack of resources of

the insured to pursue the claim. The scales of justice should be balanced by the Court fully and completely addressing the issues of the burden of proof in an "all risk" policy, and the application of Fed. R. Evid. 408, 701, and 702 in limiting the introduction of the flood insurance settlement agreement and the testimony of non-expert witnesses on the cause of the loss. This case is of the highest public importance and national interest based upon the significant impact Hurricane Katrina had on private property and in the insurance industry and the issues that will arise with future hurricanes.

REASONS FOR GRANTING THE PETITION

I. Petitioners seek review of the Eleventh Circuit's ruling that the insured, rather than the insurer, has the burden of proof on the amount of damage caused by water during a hurricane because it is in conflict with the ruling of the Fifth Circuit, Tenth Circuit, Second Circuit and other courts as to who has the burden of proof on a exclusion under an "all risk" policy

The law is clear that an "all risks" insured need prove only the loss or damage to the insured property, with the burden then shifting to the insurer to prove the loss arose from a cause excluded under the policy. *Dow Chemical Co. v. Royal Indem. Co.* 635 F.2d 379, 386 (5th Cir. 1981); *Leprino Foods Co. v. Factory Mut. Ins. Co.*, 453 F.3d 1281 (10th Cir. 2006); *International Multifoods Corp. v. Commercial Union Ins. Co*, 309 F.3d 76, 84 (2nd Cir. 2002); *North American Foreign Trading Corp. v. Mitsui Sumitomo Ins. USA, Inc.*, 499 F.Supp.2d 361, 374 (S.D.N.Y.

2007). There is not legal justification for a different standard to be applied to damage by a hurricane. Based upon these cases, the law requires the all risk insurer in a hurricane case to prove the exclusion--water damage to the property.

In the pretrial proceedings, the district court determined the Lexington policy was an all risk policy and accurately set forth the burden of proof of the insurer.[5] However, in the jury instruction, the

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[5] The district court ruled in its decision on the various motions for summary judgment in this matter as follows:

> The parties agree that the Policy covers loss from wind. Lexington contends that the amount of wind damage was limited to the $64,167.86 it tendered the plaintiffs. The plaintiffs contend that wind, rather than flood, caused two walls of the house to collapse, which in turn required the structure's demolition, such that the damage attributable to wind is much greater than Lexington concedes.
>
> "The insurer bears the burden of proving the applicability of an exclusionary clause within a policy." *Blackburn v. National Union Fire Insurance Co.*, 784 So.2d 637, 641 (La. 2001). Thus, on motion for summary judgment Lexington bears the initial burden of showing affirmatively that no reasonable jury could find less flood damage, and more wind damage, than Lexington contends.

App. O, page 196a.

Further, in its ruling on the Petitioners' motion in limine, the court stated as follows:

> After rulings on motions for summary judgment and a voluntary dismissal by the plaintiffs, this case boils down to one for insurance benefits. The question is whether and to what extent the insured property suffered wind damage (covered) or water/flood damage (excluded). As insisted by the plaintiffs and held by the court in an earlier ruling, the insurer bears the burden of showing the applicability of a policy exclusion.

App. N, page 169a.

district court completely viscerated the distinction between a "perils" policy and an "all risk" policy.[6] The issue of whether this is an all risk policy is not contested. The opinion of the Panel acknowledges the following jury instruction was given to the jury:

> ". . .that the initial burden is on the plaintiffs to proof 'the existence of the policy sued on, it terms and provisions, **that their claim is within its coverage, and the amount of their covered damage**.'"

App. C, page 14a. (Emphasis added). This clearly is not a proper statement of the law on an all risk policy, and the insured clearly does not have the burden to prove the amount of his covered damage as specifically stated in the jury instruction. Because of the unique nature of hurricane cases when no one is present to see the cause of the loss, the jury's complete understanding of who has to prove the cause of the loss is a key element in affording all parties their day in court. The court fell woefully short of explaining the burden of proof properly in this case.

An all risk policy initially covers any property damage by its express terms. The insured is only required to prove that his property has been damaged–in this case that the walls of his house have fallen down. The only damage that is not covered is property damage caused by an exclusion, i.e., water. An all risk policy, by its name and terms, insures the insured against any loss caused by any reason except losses that are excluded from the policy. In this case,

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[6] See *Alex R. Thomas & Co. v. Pacific Indem. Co.*, 2002 WL 737478, 4 (Cal. App. 1 Dist. 2002) for a full discussion of differences between an all risk and perils policy.

the insurer would have the burden of proving water caused damage to the walls of the property after Petitioners met their initial burden of showing the walls had fallen down during the hurricane. On the other hand, a perils policy lists each peril that is covered, and if the peril is not listed, then no coverage exists. If a perils policy had existed, Petitioners would have had the burden of proof on what caused the damage to the walls and would have been required to prove that wind, which is a covered peril, caused the walls to fall down. Since the policy issued by Lexington was an "all risk" policy, the insurer had the burden to prove the exclusion—that water caused the walls to fall down. The distinction between a perils policy and an all risk policy is very important in hurricanes when no persons are present to see first hand what caused the damage to the house.[7]

The district court allowed Lexington to argue Petitioners had the burden of proof on the wind causation issue based upon the previous ruling of the court at the commencement of the proceeding on August 14, 2007. App. P, pg. 264a-268a; App. Q, pg. 270a-272a. The court used the same burden of proof in instructing the jury as to the burden of proof. App. R, pg. 321a-322a. Further, it allowed Lexington to argue the improper standard of burden of proof to the jury.[8] App. R, pg. 320a-321a. Because of this confusion, the argument of Lexington's counsel, and the fact the

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[7] In fact, counsel for Lexington argued at the oral argument before the Eleventh Circuit the burden of proof for an all risk policy and a perils policy was one in the same, which was apparently accepted.

[8] App. Q, pg. 314a, ll. 19-23; App. Q, pg. 312a, l.5-pg. 314a, l. 9; App. R, pg. 318a, ll. 15; App. R, pg. 318a-319a, ll. 1-10; App. R, pg. 322a, ll. 21-25.

court allowed Lexington to argue to the jury an improper burden of proof, the jury improperly completed the jury interrogatory form and did not answer the amount of water damage or the total loss. App. A, pages 3-4a. A writ should be granted so that this Court may see the errors committed in this proceeding and have the opportunity to set forth instructions that courts should give in hurricane cases when all risk policies are implicated.

In *National Union Fire Ins. Co. of Pa. v. Carib Aviation, Inc.*, 759 F.2d 873, 875 (11th Cir.1985), the Eleventh Circuit explained that "in order to recover under an all risk policy, an insured must prove only the loss or damage to the insured's property while the policy was in force, with the burden then shifting to the insurer to prove that the loss arose from a cause that is excluded under the policy." See also *Jewelers Mutual Insurance Co. v. Balogh*, 272 F.2d 889, 892 (5th Cir. 1959); *Morrison Grain Co., Inc. v. Utica Mut. Ins. Co.*, 632 F.2d 424, 430 (5th Cir. 1980). Despite the specific holding in *Nat'l Union Fire Ins. Co. of Pa. v. Carib Aviation, Inc.*, the court adopted its own rule.

The case law in Eleventh Circuit and the predecessor Fifth Circuit is clear that the insurance company has to prove the cause of the loss when an all risk policy exists. In the case of hurricane cases, when no witnesses are present, the insurer must affirmatively prove that the water caused the loss. The court clearly did not explain to the jury that the insurer had the obligation to prove that the cause of the damage to the walls was water. All courts have concluded the Lexington policy was an "all risk policy". Lexington had the burden to prove the loss

was caused by an "excluded peril"-water.[9] The district court failed to recognize the different burdens of proof required of an insurer for an "all risks" policy and a "perils" policy.[10]

The Court is free to apply the traditional federal common law technique of decision by drawing upon standard insurance principles. In addition, because insurance policies are contracts, basic contract rules govern the interpretation of a policy's terms. *Eagle-Picher Industries v. Liberty Mutual Insurance Co.*, 682 F.2d 12 (1st Cir.1982) ("[i]nsurance policies are generally interpreted in the same way as other contracts"), *cert. denied,* 460 U.S. 1028, 103 S.Ct. 1279, 75 L.Ed.2d 500 (1983); *Atlas Pallet, Inc. v. Gallagher,* 725 F.2d 131, 135 (1st Cir. 1984); *Tucard, LLC v. Fidelity Nat. Property & Cas. Ins. Co.*, 567 F.Supp.2d 215, 221 (D.Mass. 2008).

The Court should grant a writ on these issues because the Court has ample authority to control the administration of justice in the federal court system to insure the implementation of proper jury instructions under Rule 51 of the Federal Rules of Civil Procedure that are clear and reflective of the law. *Danforth v. Minnesota,* - - - U.S. - - - -, 128 S.Ct. 1029, 1046-1047, 169 L.Ed.2d 859 (2008); *Johnson v.*

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[9] ". . .an "all risks" insured need prove only the loss or damage to the insured property, with the burden then shifting to the insurer to prove that the loss arose from a cause that is excluded under the policy". *Dow Chemical Co. v. Royal Indem. Co.*, 635 F.2d 379, 386 (5th Cir. 1981).

[10] See App. Q, pg. 306a, ll. 25-pg. 307a, ll.2, 13-17 relating to dismissal of contents; App. Q, pg. 312a, ll. 5-pg. 314a, ll. 9 relating to charge conference on burden of proof; App. R-pg. 318a, ll. 15 relating to discussion of change of burden of proof; App. R- pg. 318a, ll. 1-10; App. R-pg. 322a, ll. 21-25 for jury instruction.

Fankell, 520 U.S. 911, 117 S.Ct. 1800, 138 L.Ed.2d 108 (1997).

II. Petitioners seek review of the Eleventh Circuit's ruling because it is in conflict with the rulings of this court in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed.2d 469 (1993) and circumvented Fed. R. Evid. 701 and 702 by allowing opinion testimony of insurance adjusters on the cause of damage to the petitioners' home when these individuals had not been qualified or named as experts, and it is in conflict with the ruling of other circuits as set forth herein

Tracy Clark and James Gibson are flood insurance adjusters, who testified at trial. Petitioners objected to their testimony prior to the trial in a motion in limine. App. L, page 147a. Lexington introduced their testimony as expert witnesses even though they had not been qualified under *Daubert*. App. L-pg. 148a-152a; App. M-pg. 165a. The legal issue presented for review by this Court is whether an insurance adjuster, who has no personal knowledge of the cause of the damages to a house from a hurricane and who has not been qualified as an expert under *Daubert*, can testify at trial as to the cause of the loss? *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed.2d 469 (1993); Fed. R. Evid. 701 and 702.

After Lexington recognized that it had not timely designated these individuals as expert witnesses, Lexington attempted to have them testify as "lay witness" under a limited exception even though these witnesses had no personal knowledge of the cause of

the loss. The district court ruled Clark and Gibson could testify despite the fact that they were testifying as to the same conclusion as Van Fisher, who had been timely designated as an expert and subjected to *Daubert* review. App. N, pages 173a-174a. Mr. Clark and Mr. Gibson testified at trial over the objection of Petitioners.[11] What is more ironic is Clark admitted he did not have the expertise to make the determination and needed the support of engineers to support his testimony. App. Q, pg. 408, l. 5-pg. 410, l. 6.

Rule 701 and 702 and the line of cases from *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed.2d 469 (1993) clearly set forth the "gate keeper" functions of the federal courts and the rules that must be followed. The adjusters of the insurers were not qualified as expert witnesses and had no first hand knowledge of what caused the loss to the house. Further, the adjusters testified on the same subject matter as Lexington's *Daubert* qualified expert and was "based on the same scientific, technical, or other specialized knowledge within the scope of Rule 702" that was used by Lexington's designated expert.

In the ruling of the Eleventh Circuit, the Panel stated the following:

> The testimony offered by Clark and Gibson specifically related to damage to the home they observed during the inspection they personally conducted, the reports they each individually prepared regarding their assessments of the

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[11] App. P, pg. 243a-266a; App. Q, pg. 274a-276a, 281a, ll. 12-15, pg. 281a, ll. 2, pg. 283a, l. 3; See also App. Q, pg. 280a, ll. 8-9; pg. 286a, ll. 17-24.

> damage to the Preis' home and the procedures they employed to reach their loss estimates.

App. C, at page 10a. The ruling acknowledges that the adjusters were giving an opinion as to the cause of the damage to the house but misinterprets the requirement of first hand knowledge of the witness.

Fed. R. Evid. 701 provides the following relating to opinion testimony by lay witnesses:

> 701. Opinion Testimony by Lay Witnesses
>
> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Fed. R. Evid. 701. App. G, page 20a.

Under Rule 701, "a lay opinion must be based on personal perception, must be one that a normal person would form from those perceptions, and must be helpful to the jury." *U.S. v. Riddle*, 103 F.3d 423, 428 (5th Cir.1997); *Soden v. Freightliner Corp.*, 714 F.2d 498, 511 (5th Cir.1983). In particular, the witness must have personal knowledge of the facts underlying the opinion and the opinion must have a rational connection to those facts. *Mississippi Chemical Corp. v. Dresser-Rand Co.*, 287 F.3d 359, 373 (5th Cir. 2002). Lexington used three experts to testify to the same issue, but only one of the experts had been designated as such and was subject to the scrutiny required by *Daubert v. Merrell Dow Phar-*

maceuticals, supra.[12] "Simply put, expert testimony may be assigned talismanic significance in the eyes of lay jurors, and, therefore, the district courts must take care to weigh the value of such evidence against its potential to mislead or confuse." *U.S. v. Frazier,* 387 F.3d 1244, 1263 (11th Cir. 2004).

In order for the lay person's testimony to be admissible, Lexington must show the witness has personal knowledge of facts and that the offered opinion is based upon first hand knowledge of the fact and "(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." The admission of the testimony of Tracy Clark and James Gibson fails both of these requirements. App. P, pg. 245a-264a; App. Q, pg. 272a-301a. First, the lay witness adjusters had no first had knowledge of what caused the loss, wind or water, because they were not present the day of the storm. Secondly, this testimony and review of the evidence was identical to the expert opinion of Van Fisher, who was designated as an expert witness. It is without debate Tracy Clark and James Gibson's testimony was "based on scientific, technical, or other specialized knowledge within the scope of Rule 702" because it was exactly the same testimony and subject matter of Lexington's expert, Van Fisher.

As stated in the case of *U.S. v. Williams,* 81 F.3d 1434, 1442 (7th Cir. 1996), "The difference between an expert witness and an ordinary witness is that the former is allowed to offer an opinion, while the latter

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[12] District courts have the continuing responsibility of acting as the vigilant gatekeepers of expert testimony to ensure that it is reliable. *See Kumbo Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2nd 238 (1999), 147-149, 119 S.Ct. 1167; *U.S. v. Freeman,* 488 F.3d 1217, 1227 (9th Cir. 2007).

is confined to testifying from personal knowledge. Fed.R.Evid. 701, 702; *Richardson v. Consolidated Rail Corp.*, 17 F.3d 213, 218 (7th Cir.1994); *U.S. v. Fidelity & Deposit Co.*, 986 F.2d 1110, 1117-18 and n. 8 (7th Cir.1993); *Kaczmarek v. Allied Chemical Corp.*, 836 F.2d 1055, 1060-61 (7th Cir.1987)." It is clear a person that testifies as to the "cause of the event" when he has no first had knowledge falls within the definition of an expert opinion.

Review is needed to resolve a clear conflict among the Eleventh Circuit and the other circuits and to resolve a clear conflict in ruling in this case and *Daubert v. Merrell Dow Pharmaceuticals*, *supra*. Further, the decision below is wrong and dramatically misreads statutory language of Federal Rules of Evidence 701 and 702 and this Court's precedent.

III. Petitioners seek review of the Eleventh Circuit's ruling because it is in conflict with the ruling of other circuits and Federal Rule of Evidence 408 by confirming the district court ruling that evidence of the settlement agreement with the flood insurer is admissible into evidence by the "wind insurer" to prove the cause of the loss to the house.

Petitioners had previously settled with Hartford, who had provided the federal flood insurance coverage. Lexington listed the flood settlement agreement as an exhibit that it intended to use at trial to prove the cause of the loss to the property. The amount of the flood settlement in the amount of approximately $587,659.71 was evidenced by App. K, pages 145a-146a. Petitioners filed a motion in limine objecting to the introduction of the settlement agreement into

evidence. App. L, page 147a; App.M, page 158a. The trial court ruled the amount of the flood settlement was admissible. App. N, pg. 2-4. The court's admission of the settlement agreement between Petitioners and the flood insurer was clearly prejudicial and was not in accordance with Fed. R. Evid. 408. App. N, pg. 171a-172a. The wrongfully admitted flood insurer settlement became the primary theme for Lexington's defense of the claim. App. P, pg. 207a-208a; pg. 209a, l. 15; pg. 209a, l. 3; pg. 210a; pg. 211a-214a; App. R, pg. 319a-320a, ll. 10-20. It is hard to envision an evidentiary ruling being more prejudicial.

The Panel issued a ruling that conflicts with a long line of cases in all circuits barring the introduction of insurance settlement agreements that arise out of damages from the same occurrence. There is certainly no reason for there to be a different application of law just because multiple types of policies cover damage from a hurricane.

Congress, in adopting Fed. R. Evid. 408, has statutorily determined settlement agreements are to be encouraged, and are not admissible into evidence. In hurricane cases, the ruling effectively allows the introduction into evidence of the insurer that settles first. In many instances, this will implicate the timing and amount of the payment arising from federal flood insurance. This Court clearly has a federal interest in regulating this issue.[14] There is no

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[14] This policy and *all disputes arising from the handling of any claim under the policy* are governed exclusively by the flood insurance regulations issued by FEMA, the National Flood Insurance Act of 1968, as amended (42 U.S.C. §4001, *et seq.*), and federal common law. *Shuford v. Fidelity Nat. Property & Cas. Ins. Co.*, 508 F.3d 1337, 1344 (11th Cir. 2007); *Studio Frames Ltd. v. Standard Fire Ins. Co.*, 483 F.3d 239 (4th Cir. 2007).

reason for any court to carve an exception into Fed. R. Evid. 408 based upon hurricane cases. As a matter of policy, this encourages either the wind or water insurer to wait to settle because of the potential of using the other parties settlement in defending their lawsuit. This has never been the law. The Panel and district court eliminated the public policy consideration of encouraging settlement as adopted by the United States Congress.

Fed. R. Evid. 408 provides in pertinent part: "Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. . . ." Fed. R. Evid. 408. App. F, page. 19a. *Reynolds v. Roberts,* 202 F.3d 1303, 1318 (11th Cir. 2000). Admission of evidence of the settlement could work to discourage plaintiffs and defendants from settling with one or more of several co-defendants. *Reichenbach v. Smith*, 528 F.2d 1072, 1074 (5th Cir. 1976).

The U.S. District Court Southern District of Alabama in *Armstrong v. HRB Royalty, Inc.*, 392 F.Supp.2d 1302 (S.D. Ala. 2005), explained Fed. R. Evid. 408 precluded the admission of settlement evidence by writing:

> Rule 408 excludes evidence of settlement offers only if such evidence is offered to prove liability for or invalidity [or amount] *of the claim under negotiation.*" *Vulcan Hart Corp. v. National Labor Relations Board,* 718 F.2d 269, 277 (8th

> Cir.1983)(emphasis added). The Court concludes that Rule 408 unambiguously requires that the claim as to which a settlement offer was made and the claim at issue in the litigation in which the offer is proffered as evidence must be the same claim. (footnotes omitted).

Armstrong v. HRB Royalty, Inc., supra, at 1304-1305. Unlike the facts in *Armstrong*, the issue in the settlement and the issue in the trial was clearly the same claim–the amount of water damage to the Petitioners' residence.

This was further explained by the court in *Branch v. Fidelity & Cas. Co. of New York*, 783 F.2d 1289 (5th Cir. 1986):

> Voluntary settlements are favored for they obviate the need for costly and time-consuming litigation. *Miller v. Republic National Life Ins. Co.*, 559 F.2d 426 (5th Cir.1977). In multiparty maritime litigation, settlements "should be even more encouraged." *Cates v. United States*, 451 F.2d 411, 416 (5th Cir.1971). The spectre of a subsequent use to prejudice a separate and discrete claim is a disincentive which Rule 408 seeks to prevent. The admission of the settlement agreement into evidence, and the use made of that evidence, violated both the letter and spirit of Rule 408. *See McInnis v. A.M.F., Inc.*, 765 F.2d 240 (1st Cir.1985); *McHann v. Firestone Tire & Rubber Co.*, 713 F.2d 161 (5th Cir.1983).

Branch v. Fidelity & Cas. Co. of New York, supra, at 1294.

The district court in its rulings prior to trial erred by creating a balancing of interest under Fed. R. Evid. 401 and 403. A settlement agreement will

always be relevant as to what the settling parties believed was the cause of the loss. However, that is not the proper standard for determining whether a settlement document is admissible into evidence. By the express terms of Fed. R. Evid. 408, the settlement agreement is not admissible for two reasons–its obvious prejudicial effect and the public policy behind the encouragement of settlement. Both Lexington and the court believed the flood insurance settlement agreement was not within the scope of the rule because it did not involve the settlement agreement between Lexington and Petitioners. App. N, pg. 171a-172a. That is not a proper statement of the law.

As explained by the Fifth Circuit in *Kennon v. Slipstreamer, Inc.*, 794 F.2d 1067 (5th Cir. 1986):

> No party, or the court, should disclose to the jury the amount of a settlement with other defendants in the absence of compelling circumstances demanding disclosure which are not present here. Under the circumstances of this case, the district court's announcement to the jury violated Rule 408 and prejudiced the substantial rights of Slipstreamer. It is entitled to a new trial.

Kennon v. Slipstreamer, Inc., *supra*, at 1071.

Fed. R. Evid. 408 also applies with equal force whether the settlement involves the litigants or a litigant and a third party. *Kennon v. Slipstreamer, Inc.*, 794 F.2d 1067, 1069 (5th Cir.1986); *McHann v. Firestone Tire and Rubber Co.* 713 F.2d 161 (5th Cir. 1983); *McInnis v. A.M.F.*, Inc., 765 F.2d 240, 247 (1st Cir.1985). According to *Weinstein's Federal Evidence* § 408.04 (2d ed.2005):

> Rule 408 codifies the general practice of the federal courts in making compromise agreements

> inadmissible in such circumstances as proof of liability for, or invalidity of, the claim or its amount. . . . Even if the fact of the settlement is admissible for a purpose other than proof of liability, disclosure of the settlement amount may constitute reversible error. *Crigger v. Fahnestock and Co., Inc.* 2005 WL 857368, 1 (S.D.N.Y.) (S.D.N.Y. 2005).

As further stated in the case of *McInnis v. A.M.F., Inc.* 765 F.2d 240, 247 (1st Cir. 1985):

> In analyzing the impact of Rule 408 on the admissibility of the Poirier release, we shall initially allay any doubts that the Rule applies to cases which are posturally like the one now before us. The settlement agreement at issue here was entered into between a litigant and a third party, rather than between the two litigants themselves. The Advisory Committee Note clearly acknowledges that the policies underlying the exclusionary rule are equally applicable to such a situation. The note states that:
>
> ***While the rule is ordinarily phrased in terms of offers of compromise, it is apparent that a similar attitude must be taken with respect to completed compromises when offered against a party thereto. The latter situation will not, of course, ordinarily occur except when a party to the present litigation has compromised with a third person.***

Fed. Rule of Evid. 408, advisory committee note (Emphasis added).

Further, under Fed. R. Evid. 408, evidence of offers of settlement is inadmissible, even those settlements

between a party and a non-party. Fed. R. Evid. 408; *U.S. v. Quality Built Const.*, 358 F.Supp.2d 487, 490 (E.D.N.C. 2005). As further explained by Professor Louisell:

> When a party has potential liability to more than one claimant, or when a single claimant claims relief from more than one defendant, settlement negotiations are commonly carried out on several fronts. ***An exclusionary rule which reached only the compromise negotiations between the very parties who subsequently litigate the underlying claim would fall far short of providing the needed protection to the settlement process, and would in fact leave unprotected the very situation which poses the greatest needs***. The very terms of Rule 408 leave no doubt that it reaches these cases, and that under it a defendant cannot prove the invalidity or amount of a plaintiff's claim by proof of plaintiff's settlement with a third person, nor can plaintiff show the defendant's liability or extent of liability, by proof of defendant's settlement with a third person. 2 D. Louisell & B. Mueller, Federal Evidence s 171 at 289 (1978).

Young v. Verson Allsteel Press Co., 539 F.Supp. 193, 195 (D.C. Pa.1982). (Emphasis added.)

The Panel and the district court relied on the case of *Dallis v. Aetna Life Ins. Co.*, 768 F.2d 1303, 1307 (11th Cir.1985). This case is not controlling on this important issue as a review of the facts of this case clearly indicate it is not applicable to the facts at bar. In *Dallis*, the settlement payment in question in did not arise out of the same occurrence as the case being tried and involved different health claims for different patients with defendants, who were not

involved in the pending case. The Panel simply ignores the finding in the case which allowed the introduction of the settlement only because it arose out of a different occurrence. This case clearly is not authority to overrule the numerous cases cited by Petitioners, which would absolutely bar the admissibility of a settlement payment by an insurer arising from the same occurrence.

The court's admission of the settlement agreement between Petitioners and the flood insurer was clearly prejudicial and was not in accordance with Fed. R. Evid. 408. This wrongfully admitted flood settlement became the primary theme for Lexington's defense of the claim. Review should be granted by this Court because the ruling of the Panel and the district court is in conflict with the ruling of other circuits and Fed R. Evid. 408.

CONCLUSION

The rulings on all three of the above issues represent significant departures from the rules followed in all circuits in the United States in non-hurricane cases and are in conflict with the holding of the United States Supreme Court and the Federal Rules of Evidence. While on first blush each individual issue seems rather mundane, the interplay of these causation issues as they are applied to hurricanes have significant and unique applications to the largest catastrophic property damage issues facing this country for the last century with Hurricane Katrina. In the case of all three issues that are the subject of the writ, the district court, as affirmed by the Panel, was required to create exceptions to the long established federal law and statutes in order to uphold the decision of the jury. It is respectfully submitted there is no legal justification for the

district court and the Panel to create three hurricane "exceptions" to the general rules of Rules 408, 701, 702 of the Federal Rules of Evidence and the clear case law of burden of proof on exclusions in "all risk" policies that have been established in non-hurricane litigation.

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

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October 31, 2008

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 06-0360-WS-C

RICHARD PREIS and VICTORIA PREIS,
Plaintiffs,

vs.

LEXINGTON INSURANCE COMPANY,
Defendant.

ORDER ON JURY TRIAL

This action came before the Court for trial by jury on August 13, 14 and 15, 2007, with United States District Judge William H. Steele presiding. The jury was selected on July 31, 2007 and sworn on the morning of trial. The Plaintiffs presented their evidence and rested on August 13, 2007. The Defendant filed a Motion for Judgment as a Matter of Law at the conclusion of the Plaintiffs' case. The Defendant presented its evidence and rested on August 14, 2007. The Defendant renewed its Motion for Judgment as a Matter of Law at the close of all the evidence which was **GRANTED** with respect to loss of contents and **DENIED** with respect to the house for the reasons stated on the record. The Plaintiff filed a Motion for Judgment as a Matter of Law at the conclusion of all the evidence which was **DENIED** for the reasons stated on the record. The Court held a charge conference with counsel and the parties gave their closing arguments to the jury. The Court charged the jury on the applicable law and the jury commenced their deliberations.

On the 15th day of August, 2007, the jury who having heard the evidence, the arguments of counsel and having considered the same upon their oaths, returned the verdict, a copy of which is attached hereto, into open court with counsel present.

DONE and ORDERED this 21st day of August, 2007.

/s/William H. Steele
William H. Steele
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION 06-0360-WS-C

RICHARD PREIS and VICTORIA HEARIN PREIS,
Plaintiffs,

v.

LEXINGTON INSURANCE COMPANY,
Defendant.

VERDICT FORM WITH SPECIAL INTERROGATORIES

1. Do you find that the Plaintiff's property located at 15049 Scenic Highway 98, Point Clear, Alabama sustained wind damage as a result of Hurricane Katrina?

   X
   YES ____ NO

   If the answer to question #1 is "NO", sign the form and inform the Court.

   If the answer to question #1 is "YES", proceed to question #2.

2. What is the actual cash value of the Plaintiffs' loss on the home structure attributable to:

   70,000.00
   Wind ____ Flood

3. Do you find that the Plaintiffs' property was rendered unfit to live in as the result of damages caused by wind?

   ____ X
   YES NO

If the answer to question #3 is "NO", sign the form and inform the Court.

If the answer to question #3 is "YES", proceed to question #4.

4. Do you find that the Plaintiff's are entitled to Additional Living Expenses as set forth in the Lexington policy?

YES	NO
___	X

If the answer to question #4 is "NO", sign the form and inform the Court.

If the answer to question #4 is "YES", proceed to question #5.

5. What is the amount necessary to compensate the Plaintiffs for their Additional Living Expenses?

$ _____

/s/ Timothy Little
Timothy Little
Foreperson

08/15/07
Date

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

Civil Action No. 06-0360-WS-C

RICHARD PREIS and VICTORIA PREIS,
Plaintiffs,

vs.

LEXINGTON INSURANCE COMPANY,
Defendant.

FINAL JUDGMENT

In accordance with the verdict entered in the above styled action, it is ORDERED, ADJUDGED and DECREED that a FINAL JUDGMENT be, and the same is entered in favor of the Plaintiffs, Richard and Victoria Preis, and against the Defendant, Lexington Insurance Company, in the amount of $70,000.00. The Plaintiffs are entitled to recover from the Defendant their taxable costs.

DONE and ORDERED this 21st day of August, 2007.

/s/ William H. Steele
WILLIAM H. STEELE
United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[Filed June 3, 2008]

No. 07-14228
D. C. Docket No. 06-00360-CV-WS-C

RICHARD PREIS, VICTORIA HEARIN PREIS,
Plaintiffs-Appellants,

versus

LEXINGTON INSURANCE COMPANY, T&B, LTD, d.b.a. THAMES, BATRE', MATTEI, BEVILLE, and ISON, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Alabama

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(June 3, 2008)

Before DUBINA and BARKETT, *Circuit Judges*, and SCHLESINGER, *District Judge*.

PER CURIAM:

Richard and Victoria Preis[1] appeal from an adverse partial summary judgment in favor of Lexington In-

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Honorable Harvey E. Schlesinger, United States District Judge for the Middle District of Florida, sitting by designation.

[1] For ease of discussion, we will hereinafter refer to the Appellants in the singular, "Pries."

surance Company, providers of Pries' homeowner's insurance policy; an adverse summary judgment in favor of Thames, Batre, Mattei, Beville, and Ison ("T&B"), the insurance agency that issued the Lexington policy and Allen Ladd, its agent. Pries also appeals from a jury verdict of $70,000, which the jury awarded to Pries at the conclusion of a three-day trial, based on purported evidentiary errors and errors in the jury instructions. Pries seeks reversal of the district court's summary judgment rulings, and a new trial.

I. Background

Pries' home on Mobile Bay, in Point Clear, Alabama, was severely damaged by Hurricane Katrina. According to Pries, the house had a replacement value in excess of $1,200,000 and the loss on personal property in the house was in excess of $750,000.

Pries had two sets of insurance policies covering the house and its contents. First, he had a homeowner's policy ("the Lexington policy"), originally purchased in 1995. The Lexington policy was an all-risk policy that insured against any direct loss of personal or structural property of the home at issue, with certain exclusions. One of the exclusions of coverage was for loss caused "directly or indirectly" by "water damage", defined as "flood, surface water, wave, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind . . . ." The Lexington policy is the only insurance policy at issue in this appeal.

The second relevant set of insurance policies covering the property at issue at the time of Hurricane Katrina was for flood damage. Preis had a primary flood policy with Hartford Insurance Company, and an

excess flood insurance policy with WNC Insurance Services. Following Hurricane Katrina, Pries submitted a claim to both Hartford Insurance and to WNC Insurance Services. Pries received a total of $587,659.71 from these flood insurance providers for the damage incurred as a result of floods caused by the hurricane. This amount constituted the full policy limits of both policies.

Pries also notified Lexington of the loss in order to recover for wind damage under the homeowners' policy and submitted the same claim of loss to Lexington that had been submitted to the flood insurance carriers. Within one week of Preis' notification of the loss, Lexington retained an independent adjuster, Reid Jones McRorie & Williams, to investigate Pries' claim. Reid Jones issued a final report several months later, indicating that the majority of the damage to the house was a result of "storm surge", and that the "[moderate] wind damage was primarily limited to the roof." Reid Jones estimated that Pries was due a payment in the amount of $72,155.96 for the damage that had not been caused by flood waters. Based on this assessment, Lexington made Pries an unconditional tender for $53,135.97, which reflected Reid Jones' estimate less the policy's wind deductible of $19,020.00.

Preis rejected Lexington's tender of $53,135.97 and notified Lexington of his intent to file this lawsuit against Lexington. Lexington then retained the engineering services of Project Time & Cost ("PT&C") to determine the cause and origin of Preis' losses. PT&C's report confirmed that the majority of the house was damaged as a result of storm surge, but that some damage was attributable to wind damage. Based on PT&C's report, Reid Jones readjusted Pries'

estimated loss, and increased their unconditional tender by $11,031.90 to $64,167.86. Pries again rejected the loss amount, and proceeded to file the instant suit.

A three-day jury trial was held in August 2007. At the close of the evidence, and prior to the case being submitted to the jury, the district court granted Lexington's Rule 50 motion for judgment as a matter of law on Preis' claim for damage to the contents of the house, finding that Pries had failed to present facts sufficient to allow the trier of fact to segregate the amount of damages to the home's contents attributable to wind from those damages due to water from the storm surge. After deliberating, the jury awarded Pries $70,000 for damages to the structure attributable to wind.

II. Discussion

Preis challenges several aspects of the trial, as well as two of the district court's rulings on summary judgment. We address each issue in turn.

1. Evidentiary Rulings[2]

Preis argues that the district court erred in admitting evidence of "the amount of the flood settlement in the amount of $587,659.71," and contends that evidence of the flood payments is barred under Federal Rule of Evidence 408.[3] We have held that "[for

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[2] We review the district court's evidentiary rulings under a deferential abuse of discretion standard. *United States v. Frazier*, 387 F.3d 1244, 1258 (11 Cir. 2004) (en banc).

[3] Rule 408 provides in pertinent part: "Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove

Rule 408 to apply, there must be an actual dispute, or at least an apparent difference of opinion between the parties, as to the validity of a claim." *Dallis v. Aetna Life Ins. Co.*, 768 F.2d 1303, 1307 (11th Cir. 1985). We have specifically rejected the notion that "the payment of a claim by an insurance company, where there is no evidence that the insurance company ever disputed the claim, qualifies as a compromise within the meaning of Rule 408:" *Id.* 1306-07. Since Pries submitted his claim to the flood insurers and received the full policy limits from both of them absent any dispute as to the validity of his claim, the district court did not abuse its discretion in finding that Rule 408 did not bar admissibility of the payments.

Pries also argues that the lay testimony of insurance adjusters James Gibson and Tracy Clark should not have been admitted into evidence under Federal Rule of Evidence 701 because they did not have personal knowledge of the facts and because their testimony was based on "scientific, technical, or other specialized knowledge within the scope of Rule 702," which governs expert testimony. The testimony offered by both Clark and Gibson specifically related to the damage to the home they observed during the inspections they personally conducted, the reports they each individually prepared regarding their assessments of the damage to the Pries' home, and the procedures they employed to reach their loss estimates. Given the nature of their testimony, the district court

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liability for or invalidity of the claim or its amount." Fed. R. Evid. 408.

did not abuse its discretion in allowing the adjusters to testify as lay witnesses.[4]

2. Burden of Proof: Directed Verdict and Jury Instructions

Preis contends that the district court's application of an erroneous burden of proof resulted in two errors: 1) the court erroneously granted Lexington a directed verdict on the question of Lexington's liability for the damage to the contents of the home; and 2) the jury instruction regarding the burden of proof was an erroneous statement of the law. We review the allocation of the burden of proof *de novo*. *Guajardo v. Texas Dept. of Crim. Justice*, 363 F.3d 392, 395 (5th Cir. 2004); *see also United States v. DeVegter*, 439 F.3d 1299, 1303 (11th Cir. 2003) ("We generally review *de novo* questions of law.").

The Louisiana Supreme Court has stated that, "[i]n an action under an insurance contract, the insured bears the burden of proving the existence of the policy, and the coverage." *Turnstall v. Stierwald*, 809 So.2d 916, 921 (La. 2002). The insured also bears the threshold burden of proving an accidental direct

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[4] Moreover, our review of the trial transcript indicates that any opinion testimony offered by Clark or Gibson was in fact solicited by Pries. *See* Doc. 236, p. 403,11. 9-11 (Clark asked on cross, "Hypothetically, Mr. Clark, if windows blew out in this house, would you consider the contents that would have been damaged?"); Doc. 235, p. 231, II. 22-24 (Gibson asked on cross, "What would have been your loss if you had to assume that the whole thing had to be torn down?" Gibson responded, "You know, I wouldn't even wing that."). The admission of inadmissible testimony, "when responding to an inquiry by [appellant's] counsel, creates 'invited error'." *United States v. Parikh*, 858 F.2d 688, 695 (11th Cir. 1988). "[I]nvited error constitutes neither plain nor reversible error." *Id.*

physical loss to the insured property, and the amount of the loss. *See Pelas v. Amer. Emp. Ins. Co.*, 299 So.2d 815, 817 (La. App. 1974) ("As in any action on an insurance policy, the burden is upon the plaintiff to prove the loss insured against.") (Schott, J., dissenting); *Brouillette v. Phoenix Assur. Co.*, 340 So.2d 667, 672 (La. App. 1977) ("Plaintiff had the burden of proof on the amount of the loss."). Once an insured has met this initial burden, the burden then shifts to the insurer to prove by a preponderance of the evidence that the loss falls within a policy exclusion. *Turnstall*, 809 So.2d at 921 ("The insurer, however, bears the burden of showing policy limits or exclusions?). The segregation or allocation of the causes of the loss is left to the finder of fact once the parties have met their initial burdens. *See Broussard v. State Farm Fire & Casualty Co.*, No. 07-60443, 2008 WL 921699, at *5-6 (5th Cir. Apr. 7, 2008). It is with this appropriate burden of proof in mind that we now turn to Preis' arguments.

A. Directed Verdict

We review a district court's ruling on a judgment as a matter of law under Rule 50 *de novo*, examining the evidence in the light most favorable to the non-moving party. *Optimum Tech. v. Henkel Consumer Adhesives. Inc.*, 496 F.3d 1231, 1251 (11th Cir. 2007). "Judgment as a matter of law is appropriate when a plaintiff presents no legally sufficient evidentiary basis for a reasonable jury to find for him on a material element of his cause of action." *Proctor v. Flor Enterprises, Inc.*, 494 F.3d 1337, 1347 n.5 (11th Cir. 2007).

Preis argues that the district court erroneously granted Lexington's Rule 50 motion with regards to the contents because "the Plaintiffs have not identified any evidence that affords the jury a reasonable

basis for separating losses due to wind from losses due to flood." Preis contends that this placed an inappropriately high and erroneous burden of proof upon him, arguing that all he needed to do was establish the coverage, the loss and the loss amount, and not the cause of the injury. We agree with Preis regarding his burden, but agree with the district court that this initial burden was not met by Preis in this case. Had Preis simply established that he had the requisite accidental damage coverage and that he had been damaged in a specific amount, he would have met his burden of proof under his all-risk policy. Lexington would then have the burden to prove that the damages claimed were the result of water, which was a cause explicitly excluded by the coverage.

Here, however, Preis failed to initially establish a basis from which the jury could have awarded an amount for the personal property in the house that was covered by the Lexington policy. Each of Preis' witnesses in his case-in-chief conceded that there was water damage and debris on the inside of the home from the flooding, and the parties do not dispute that water damage is not covered under the Lexington policy. None of Preis' witnesses testified regarding any damage to the contents of the home not caused by water, and Preis conceded that he submitted identical claims for the contents to both his flood insurers and to Lexington. In short, Preis did not present any evidence in his case-in-chief which would support a jury finding that the contents were destroyed by anything but water. Given the absolute lack of evidence that the contents of the house were damaged by a covered peril, no reasonable jury could find that Preis had met his burden of proving the amount of covered loss by a preponderance of the evidence. Under these circumstances, we cannot find that the district court

erred by granting Lexington's motion for judgment as a matter of law regarding the contents of the Preis' home.

B. Jury Instructions Regarding Burden of Proof

We review the challenged jury instructions under a deferential standard of review. *United States v. Puche*, 350 F.3d 1137, 1148 (11th Cir. 2003). We do, however, review them *de novo* to "determine whether they misstate the law or mislead the jury to the prejudice of the objecting party." *Brochu v. City of Riviera Beach*, 304 F.3d 1144, 1155 (11th Cir. 2002).

Having reviewed the jury instructions delivered by the district court in their entirety, we cannot agree with Preis that the district court misstated the law. The district court accurately recited the burden of proof under Louisiana law. The court instructed the jurors that the initial burden is on the plaintiffs to prove "the existence of the policy sued on, its terms and provisions, that their claim is within its coverage, and the amount of their covered damage." The district court also instructed the jury that "it is the insurer who bears the burden of proving the applicability of any exclusion from coverage of the policy." Thus, the district court's jury instructions regarding the applicable burden of proof was an accurate statement of law.

3. Jury Instruction Based on Debris

Preis next argues that the district court erred by instructing the jury that "wind driven wood debris was water damage and not covered." The actual instruction the court delivered follows:

> The exclusion for water damage excludes loss resulting either directly or indirectly from flood, and loss from debris that strikes covered prop-

> erty when carried there by flood waters is loss caused indirectly by flood and is thus excluded.

We again review the challenged jury instruction under a deferential standard of review. *Puche*, 350 F.3d at 1148.

The instruction given by the court limits the exclusion from coverage to debris damage caused by flood waters, and does not implicate "wind driven wood debris" as suggested by Preis. Though the word "debris" does not appear in the language of the water damage exclusion, the language of the policy unambiguously excludes damage caused directly or indirectly from flood. Thus, the district court did not err in instructing the jury that damage from debris which strikes the covered property as a result of floods is excluded under the clear language of the water damage exclusion.

4. Summary Judgment Rulings[5]

Finally, we have carefully reviewed this record and find no error in the district court's grant of summary judgment against Preis on his claim that Lexington acted in bad faith or on his claims against T&B and Ladd.

AFFIRMED.

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[5] We review a district court's rulings on summary judgment *de novo*. *Mega Life and Health Ins. Co. v. Pieniozek*, 516 F.3d 985, 989 (11th Cir. 2008). "Summary judgment is appropriate when the evidence; viewed in the light most favorable to the nonmoving party, presents no genuine issue of material fact and compels judgment as a matter of law." *Id.*; Fed. R. Civ. P. 56(c).

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-14228-CC
Filed August 4, 2008

RICHARD PREIS, VICTORIA HEARIN PREIS,
Plaintiffs-Appellants,

v.

LEXINGTON INSURANCE COMPANY,
T&B, LTD, d.b.a. Thames, Batre', Mattel.,
Beville, and Ison, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Alabama

ON PETITION(S) FOR REHEARING AND
PETITION(S) OR REHEARING EN BANC

Before: DUBINA and BARKETT, *Circuit Judges*, and SCHLESINGER,* *District Judge*.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en

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* Honorable Harvey E. Schlesinger, United States District Judge for the Middle District of Florida, sitting by designation.

banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Rosen Barkett
ROSEN BARKETT
United States Circuit Judge

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed June 3, 2008]

No. 07-14228
D. C. Docket No. 06-00360-CV-WS-C

RICHARD PREIS, VICTORIA HEARIN PREIS,
Plaintiffs-Appellants,

v.

LEXINGTON INSURANCE COMPANY, T&B, LTD, d.b.a. THAMES, BATRE', MATTEI, BEVILLE, and ISON, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern. District of Alabama

JUDGMENT

It is hereby ordered, adjudged. and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: June 3, 2008
For the Court: Thomas K. Kahn, Clerk
By: Gilman, Nancy

Issued As Mandate August 12, 2008.

APPENDIX F

Title 28 UNITED STATES CODE

Rules of Evidence for United States Courts and Magistrates

Article VII. Compromise and Offers to Compromise

Rule 408. Compromise and Offers to Compromise

(a) Prohibited uses.—Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

(b) Permitted uses.—This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1933; Apr. 12, 2006, eff. Dec. 1, 2006.)

APPENDIX G

Title 28 UNITED STATES CODE

Rules of Evidence for United States Courts and Magistrates

Article VII. Opinions and Expert Testimony

Rule 701 Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

(Pub.L. 93-595, § 1, Tan. 2, 1975, 88 Stat.1937; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 17, 2000, eff. Dec. 1, 2000.)

APPENDIX H

Title 28 UNITED STATES CODE

Rules of Evidence for United States Courts and Magistrates

Article VII. Opinions and Expert Testimony

Rule 702 Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1937; Apr. 17, 2000, eff. Dec. 1, 2000.)

APPENDIX I

Federal Rules of Civil Procedure Rule 51

United States Code Annotated

Federal Rules of Civil Procedure for the United States District Courts

Title VI. Trials

Rule 51. Instructions to the Jury; Objections; Preserving a Claim of Error

(a) Requests.

(1) Before or at the Close of the Evidence. At the close of the evidence or at any earlier reasonable time that the court orders, a party may file and furnish to every other party written requests for the jury instructions it wants the court to give.

(2) After the Close of the Evidence. After the close of the evidence, a party may:

(A) file requests for instructions on issues that could not reasonably have been anticipated by an earlier time that the court set for requests; and

(B) with the court's permission, file untimely requests for instructions on any issue.

(b) Instructions. The court:

(1) must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final jury arguments;

(2) must give the parties an opportunity to object on the record and out of the jury's hearing be-

fore the instructions and arguments are delivered; and

(3) may instruct the jury at any time before the jury is discharged.

(c) Objections.

(1) How to Make. A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection.

(2) *When to Make.* An *objection* is timely if:

(A) before that opportunity to object, and the party objects promptly after learning that the instruction or request will be, or has been, given or refused.

(B) a party was not informed of an instruction or action on a request before that opportunity to object, and the party objects promptly after learning that the instruction or request will be, or has been, given or refused

(d) Assigning Error; Plain Error.

(1) Assigning Error. A party may assign as error:

(A) an error in an instruction actually given, if that party properly objected; or

(B) failure to give an instruction, if that party properly requested it and—unless the court rejected the request in a definitive ruling on the record--also properly objected

(2) *Plain Error.* A court may consider a plain

error in the instructions that has not been preserved as required by Rule 51(d)(1) if the error affects substantial rights.

(Amended March 2, 1987, effective August 1, 1987; March 27, 2003, effective December 1, 2003; April 30, 2007, effective December 1, 2007.)

BEST AVAILABLE COPY

LEXElite

LEXINGTON INSURANCE COMPANY

HO3 HOMEOWNER DECLARATIONS PAGE – Sub-Broker Copy –

Policy Number: LE 0541632 03 Renewal of Policy Number: LE 0541632 02

Name of Insured and Mailing Address:
Richard Preis
c/o Morgan Keegan Co.
445 North Blvd. #500
Baton Rouge, LA 70802

Broker Name and Address:
Thames Bebe Mattei Beville & Ison
PO Box 4769
Gulf Shores, AL 36547

Policy Term: 12 Month(s) Effective: 09/22/2004 Expiration: 09/22/2005 12:01 AM Standard Time at the insured's residence premises.

The residence premises covered by this policy is located at the above address, unless otherwise stated. 15049 Scenic Hwy 98, Point Clear, AL. 36564

Insurance is provided only with respect to those special limits of liability applicable thereto:

Coverage Part 1 - Homeowners		Coverage Part 2 – Personal Umbrella	
- Coverage A:	$ 634,000	- Umbrella Limit	$ 0
- Coverage B:	$ 63,400	- Self Insured Retention	$ 0
- Coverage C:	$ 317,000	**Coverage Part 3 – Excess Flood**	
- Coverage D:	$ 63,400	- Building $ 0 Excess of	$ 250,000
- Loss Assessment:	$ 1,000	- Contents $ 0 Excess of	$ 100,000
- Ordinance or Law:	10%	**Coverage Part 4 – Scheduled Property**	
- Coverage E:	$ 500,000	- Total Scheduled Property	$ 0
- Coverage F:	$ 5,000		

Homeowners Deductibles	
All Other Perils:	$ 1000
Wind and Hail:	3%
Earthquake:	Excluded
Special: None	$ N/A
Special: None	$ N/A
Minimum Earned Premium:	25%

Annual Premium:	$ 7,322.00
Lexington Policy Premium:	$ 7,322.00
Inspection Fee:	$ 0.00
Policy Fee:	$ 125.00
Surplus Lines Tax:	$ 446.82
Total Due:	$ 7,893.82

Mortgagee 1 Loan #

Mortgagee 2 Loan #

Sub Broker Information
Name: Thames Bebe Mattei Beville & Ison
Addr 1: 2085 Old Shell Road
Addr 2: PO Box 8969
City, St, Zip: Mobile, AL 36660

THIS IS A TRUE AND CERTIFIED COPY OF THIS POLICY.

Homeowners Rating Information:

Territory:	48	Year Built:	1957
County:	Baldwin - AL	Construction:	Masonry
PC:	4	EQ zone:	N/A

Forms and Endorsements made part of this policy at time of issuance:
Please See Schedule of Forms and Endorsements

This declaration pegs with policy provisions and endorsements, if any, issued to form a part, thereof, completes the above numbered homeowner's policy.

This insurance is issued pursuant to the AL surplus lines law. Persons insured by surplus lines carriers do not have the protection of the AL Insurance Guaranty Act to the extent of any right of recovery for the obligation of an insolvent, unlicensed insurer.

Countersignature Date: 09/26/2004
Countersigned At: Gulf Shores, AL
Date Issued: 09/26/2004
Countersignature:

LexElite 11/00 Authorized Representative

LEX 00001
PREIS

Policy Number LE 0541632 03

Effective Date: 09/22/2004
Date Issued:08/26/2004

SCHEDULE FORMS AND ENDORSEMENTS

LEX 04 33 04 02	Limited Mild Related Coverage
HO 00 03 04 91	Homeowners 3 Special Form
HO 01 01 05 97	Special Provisions – Alabama
HO 04 14 04 91	Special Computer Coverage
HO 04 16 04 91	Premises Alarm or Fire Protection System
HO 04 90 04 91	Personal Property Replacement Cost
HO 04 96 04 91	Home Day Care Exclusion
HO 05 80 05 97	Remediation, Limited Lead & Escaped Liquid Fuel Liability Coverages
LEX 00 04 01 01	Lexington Standard Policy Conditions
LEX 00 14 03 01	Important Flood Insurance Notice
LEX 00 30 05 03	Exterior Insulation and Finish System Exclusion
LEX 01 09 03 03	Special Provisions
LEX 03 14 01 01	Windstorm or Hail Percentage Deductible
LEX 05 80 01 01	Advisory Notice to Policyholders – Explanatory Memo
LEX 15 31 08 01	Special Personal Property Coverage

POLICY NUMBER: LE 0541632 03

HOMEOWNERS
LEX 04 33 04 02

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

LIMITED MOLD RELATED COVERAGE

(Coverage Part 1- Homeowners Only)
SCHEDULE"

These limits of liability apply to the total of all loss or costs payable under this endorsement, regardless of the number of "occurrences", the number of claims made, or the number of locations insured under this endorsement and listed in this Schedule.		
1.	Section 1— Property Coverage Limit Of Liability for the Additional Coverage "Mold Related Items"	$5,000
2.	Section II — Coverage E Aggregate Sublimit Of Liability for "Mold Related Items'	$5,000

*Entries may be left blank if shown elsewhere in this policy for this coverage.

DEFINITIONS

The following definitions are added:

1. "Mold Related Items" include the following definitions for "Fungus(i)", "Mold(s)", "Spore(s)', but also includes, Wet or Dry Rot, Bacteria, Mildew or Yeast.

   a. Fungus(i)' includes, but is not limited to, any of the plants or organisms belonging to the major

group Fungi, lacking chlorophyll, and including molds, rusts, mildews, smuts, mushrooms, and any mycotoxins, spores, scents or byproducts produced or released by fungi.

b. 'Mold(s)' includes, but is not limited to, any superficial growth produced on damp or decaying organic matter or on living organisms, and fungi

c. "Spore(s)" means any dormant or reproductive body produced by or arising or emanating out of any "fungus(i)", "mold(s), mildew, plants, organisms or microorganisms.

SECTION I PROPERTY COVERAGES

ADDITIONAL COVERAGES

The following Additional Coverage is added:

12. "Mold Related Items"

a. The amount shown in the Schedule above is the most we will pay for:

(1) The total of all loss payable under Section1— Property Coverages caused by 'mold related items";

(2) The cost to remove "mold related items" from properly covered under Section 1 — Property Coverages;

(3) The cost to tear out and replace any part of the building or other covered property as needed to gain access to the "mold related items'; and

(4) The cost of testing of air or property to confirm the absence, presence or level of *mold related items' whether performed prior to, during or after removal, repair, restoration

or replacement The cost of such testing will be provided only to the extent that there is a reason to believe that there is the presence of "mold related items".

b. The coverage described in 12.a. only applies when such loss or costs are a result of a Peril Insured Against that occurs during the policy period and only if all reasonable means were used to save and preserve the property from further damage at and after the time the Peril Insured Against occurred.

c. The amount shown in the Schedule for this coverage is the most we will pay for the total of all loss or costs payable under this Additional Coverage regardless of the:

(1) Number of locations insured under this endorsement or

(2) Number of claims made.

d. If there is covered loss or damage to covered property, not caused, in whole or in part, by "mold related items", loss payment will not be limited by the terms of this Additional Coverage, except to the extent that "mold related items" causes an increase in the loss. My such increase in the loss will be subject to the terms of this Endorsement.

This coverage does not increase the limit of liability applying to the damaged covered property.

(This is Additional Coverage 11. in Form HO 00 06.)

SECTION I — PERILS INSURED AGAINST

In Form HO 00 03 or HO 00 03, HO 00 04 and HO 00 06 with LEX 15 31:

Paragraph 2;043) or 1.b.(5)(c) (if LEX 15 31 Is attached) is deleted and replaced by the following:

(3) or (c) Smog, rust or other corrosion;

Paragraph 2.e.(9) or 1.b.(4)(c) (if LEX 15 31 is attached) is added:

(9) or (I) Constant or repeated seepage or leakage of water or the presence or condensation of humidity, moisture or vapor, over a period of weeks, months or years unless such seepage or leakage of water or the presence or condensation of humidity, moisture or vapor and the resulting damage is unknown to all insureds" and is hidden within the wails or ceilings or beneath the floors or above the ceilings of a structure.

In Form HO 00 06 with HO 17 31:

Paragraph 3.d.(3) is deleted and replaced by the following:

(3) Smog, rust or other corrosion; Paragraph 34.(9) is added:

(9) In Form HO 00 06 with HO 17 32:

Paragraph 2.e.(3) is deleted and replaced by the following:

(3) Smog, rust or other corrosion; Paragraph 2.e.(9) is added:

(9) Constant or repeated seepage or leakage of water or the presence or condensation of humidity, moisture or vapor, over a period 01 weeks, months or years unless such seepage or leak-

age of water or the presence or condensation of humidity, moisture or vapor and the resulting damage is unknown to all "insureds" and Is hidden within the walls or ceilings or beneath the floors or above the ceilings of a structure.

SECTION I — EXCLUSIONS

Exclusion 1.1 is added.

I. "Mold Related items"

"Mold Related Items" including the presence, growth, proliferation, spread or any activity of "mold related items".

This Exclusion does not apply:

(1) When "Mold Related Items' results from fire or lightning; or

(2) To the extent coverage is provided for in the "Mold Related Items" Additional Coverage under Section 1 — Property Coverages with respect to loss caused by a Peril Insured Against other than fire or lightning.

Direct loss by a Peril Insured Against resulting from "Mold Related Items" is covered.

(This is Exclusion 9. in Form HO 00 04 and HO 00 064

SECTION II — CONDITIONS

Condition 1. Limit Of Liability is deleted and replaced by the following:

1. Limit Of Liability

Our total liability under Coverage E For all damages resulting from any one "occurrence" will not be more than the Coverage E limit of liability

shown In the Declarations. This limit is the same regardless of the number of "insureds" claims made or persons injured. All "bodily injury" and "property damage" resulting from any one accident or from continuous or repeated exposure to substantially the same general harmful conditions will be considered to be the result of one "occurrence".

Our total liability under Coverage F for all medical expense payable for "bodily injury" to one person as the result of one accident will not be more than the Coverage F limit of liability shown in the Declarations.

However, our total liability under Coverage E for the total of all damages arising directly or indirectly, in whole or in part, out of the actual, alleged or threatened inhalation of, Ingestion of, contact with, exposure to, existence of, or presence of any "Mold Related Items" will not be more than the Section II — Coverage E Aggregate Sublimit Of Liability for "Mold Related items'. That sublimit is the amount shown in the Schedule. This is the most we will pay regardless of the:

a. Number of locations insured under the policy to which this endorsement is attached;

b. Number of persons injured;

c. Number of persons whose property is damaged;

d. Number of "insureds"-, or

e. Number of "occurrences" or claims made.

This sublimit is within, but does not Increase, the Coverage E limit of liability. It applies separately to each consecutive an-

nual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations.

With respect to damages arising out of "Mold Related Items" described in 1. Limit Of Liability of this endorsement, Condition 2. Severability Of Insurance is deleted and replaced by the following:

2. Severability Of Insurance

This insurance applies separately to each "insured" except with respect to the Aggregate Sublimit of Liability described in this endorsement under Section II — Conditions 1., Limit Of Liability. This condition will not increase the limit of liability for this coverage.

SECTION I AND II CONDITIONS

Condition 1. Policy Period is deleted and replaced by the following:

1. Policy Period

This policy applies only to loss or costs in Section I or "bodily Injury" or "property damage" in Section II, which occurs during the policy period.

All other provisions of the policy apply. This limited coverage applies to Coverage Part I Homeowners only. No other coverage parts provide this type of coverage.

HOMEOWNERS
HO 00 03 04 91

HOMEOWNERS 3
SPECIAL FORM

AGREEMENT

We will provide the insurance described in this policy in return for the premium and compliance with all applicable provisions of this policy.

DEFINITIONS

In this policy, "you" and "'your" refer to the "named insured" shown in the Declarations and the Spouse if a resident of the seine household. 'We,' "us" and "our" refer to the Company providing this insurance. In addition, certain words and phrases are defined as follows:

1. "Bodily injury' mean's bodily harm, sickness or disease, including required care, loss of service's and death that results.
2. "Business" includes trade, profession or occupation.
3. "Insured" means you and residents of your household who are:
   a. Your relatives; or
   b. Other persons under the age of 21 and in the care of any person named above,

Under Section II, Insured" also means:

c. With respect to animals or watercraft to which this policy applies, any person or organization legally responsible for these animals or watercraft which are owned by you or any person in-. eluded In 3.a. or 3.b.

above, A person or organization .using or having custody of these animals or watercraft in the course of any "business" or without consent of the owner is not an Insured";

d. With respect to any vehicle to which this policy applies:

(1) Persons While 'engaged in your employ or that of any person Included in 3.a. or 3.b. above; or

(2) Other persons using. the vehicle on an "insured location" with your consent.

4. "insured location" means:

a. The "residence premises";

b. The part of other premises, other structures and grounds used by you as a residence and:

(1) Which is shown in the Declarations; or

(2) Which is acquired by you during the policy period for your use as a residence;

c. Any premises used by you in connection with a premises in 4.a. and 4.b, above;

d. Any part of a premises:

(1) Not owned by an Insured"; and

(2) Where an Insured" is temporarily residing;

e. Vacant land, other than farm land, owned by or-rented to an Insured";

f. Land owned by or rented to an "insured" en which a one or two family dwelling is being built as a residence for an "insured";

g. Individual or family cemetery plots or burial vaults of an "insured"; or

h. Any part of a premises occasionally rented to an "insured" for other than "business" use.

5. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in:

a. "Bodily injury"; or

b. "Property damage."

6. "Property damage" means physical injury to, destruction of, or loss of use of tangible property.

7. "Residence employee" means:

a. An employee of an "insured" whose duties are related to the maintenance or use of the "residence premises," including household or domestic services; or

b. One who performs similar duties elsewhere not related to the "business" of an insured."

8. "Residence premises" means:

a. The one family dwelling, other structures, and grounds; or

b. That part of any other building;

where you reside and which is shown as the "residence premises" in the Declarations.

"Residence premises" also means a two family dwelling where you reside in at least one of the family units and which is shown as the "residence premises" in the Declarations.

SECTION I — PROPERTY COVERAGES

COVERAGE A Dwelling

We cover:

1. The dwelling on the "residence premises" shown in the Declarations, including structures attached to the dwelling: and
2. Materials- and supplies- located on or next, to the "residence premises" used to construct, alter or repair the dwelling or other structures on-the "residence premises."

This coverage does not apply to land, including land on which the dwelling is located.

COVERAGE B Other Structures

We cover other structures on the "residence premises" set apart from the dwelling by clear space. This includes structures connected to the dwelling by only a fence, utility line, or similar connection.

This coverage does not apply to land, including land on which the other structures are located,

We do not cover other structures:

1. Used in whole or in part for "business"; or
2. Rented or held for rental to any person not a tenant of the dwelling, unless used solely as a private garage.

The limit of liability for this coverage will not be more than 10% of the limit of liability for that applies

to Coverage A. Use of this coverage does not reduce the Coverage A limit of liability.

COVERAGE C — Personal Property

We cover personal property owned or used by an "insured" while it is anywhere in the world.- At your request, we will cover personal property owned by:

1. Others while the property is on the part of the "residence premises" occupied by an "insured";
2. A guest or a "residence employee," while the property is in any residence occupied by an "insured."

Our limit of liability for personal property usually located at an 'insured's" residence, other than the "residence premises," is 10% of the limit of liability for Coverage C, or $1000, whichever is greater. Personal property in a newly acquired principal residence is not subject to this limitation for the 30 days from the time you begin to move the property there.

Special Limits of Liability. These limits do not increase the Coverage C limit of liability. The special limit for each numbered category below is the total limit for each loss for all property in that category.

1. $200 on money, bank notes, bullion, gold other than goldware, silver other than silverware, platinum, coins and medals.
2. $1000 on securities, accounts, deeds, evidences of debt, letters of credit, notes other than bank notes, manuscripts, personal records, passports, tickets and stamps. This dollar limit applies to these categories regardless of the medium (such as paper or computer software) on which the material exists.

This limit includes the cost to research, replace or restore the information from the lost or damaged material.

3. $1000 on watercraft, including their trailers, furnishings, equipment and outboard motors.

4. $1000 on trailers not used with watercraft.

5. $1000 for loss by theft of jewelry, watches, furs, precious and semi-precious stones.

6. $2000 for loss by theft of firearms

7. $2500 for loss by theft of silverware, silver-plated ware, goldware, gold-plated ware and pewterware. This includes flatware, hollowware, tea sets, trays and trophies made of or including silver, gold or pewter.

8. $2500 on property, on the "residence premises," used at any time or in any manner for any "business" purposes

9. $250 on property, away from the "residence premises," used at any tme or in aany manner for any "business" purpose. However, this limit does not apply to loss to adaptable electronic apparatus as described in Special Limits 10 and 11 below.

10. $1000 for loss to electronic apparatus, while not in or upon a motor vehicle or other motorized land conveyance, if the electronic apparatus is equipped to be operated by power from the electrical system of the vehicle or conveyance while retaining its capability of being operated by other sources of power. Electronic apparatus includes:

    a. Accessories and antennas; or

b. Tapes: wires, records, discs or other media; for use with any electronic apparatus.

11. $1000 for loss to electronic apparatus, while not in or upon a motor vehicle or other motorized land conveyance, if the electronic apparatus:

a. is equipped to be operated by power from the electrical system of the vehicle or conveyance while retaining its capability of being operated by other sources of power

b. is away from the "residence premises"; and

c. is used at any time or in any manner for any "business purpose".

Electronic apparatus includes:

a. Accessories and antennas' or

b. Tapes, wires, records, discs or other media; for use with any electronic apparatus.

Property Not Covered We do not cover:

1. Articles separately described and specifically insured in this or other insurance;

2. Animals, birds or fish;

3. Motor vehicles or all other motorized land conveyances. This includes:

a. Their equipment and accessories; or

b. Electronic apparatus that is designed to be operated solely by use of the power from the electrical system of motor vehicles or all other motorized land conveyances. Electronic apparatus includes:

(1) Accessories or antennas; or

(2) Tapes, wires, records, discs or other media; for use with any electronic apparatus.

The exclusion of properly described in 3.a. and 3.b. above applies only while the property is In or upon the vehicle or conveyance.

We do cover vehicles or conveyances not subject to motor vehicle registration which are:

a. Used to service an "insured's" residence; or

b. Designed for assisting the handicapped;

4. Aircraft and parts. Aircraft means any contrivance used or designed for flight, except model or hobby aircraft not used or designed to carry people or cargo;

5. Property of roomers, boarders and other tenants, except property of roomers and boarders related to an Insured";

6. Property In an apartment regularly rented or held for rental to others by an Insured," except as provided in Additional Coverages 10.;

7. Property rented or held for rental to others off the "residence premises";

8. "Business" data, including such data stored in:

a. Books of account, drawings or other paper records; or

b. Electronic data processing tapes, wires, records, discs or other software media;

However, we do cover the cost of blank recording or storage media, and of pre-recorded computer programs available on the retail market; or

9. Credit cards or fund transfer cards except as provided in Additional Coverages 6.

COVERAGE D—Loss of Use

The limit of liability for Coverage D is the total limit for all the coverages that follow.

1. If a loss covered under this Section makes that part of the "residence premises" where you reside not fit to live in, we cover, at your choice, either of the following. However, if the 'residence premises" is not your principal place of residence, we will not provide the option under paragraph b. below.

   a. Additional Living Expense, meaning any necessary increase in living expenses incurred by you so that your household can maintain its normal standard of living; or

   b. Fair Rental Value, meaning the fair rental Value of that part of the "residence premises" where you reside lee's any expenses that do not continue while the premises is not fit to live in.

   Payment under a, or b: will be for the shortest time required to repair or replace the damage or, if you permanently relocate; the shortest time required for your household to settle elsewhere.

2. If a loss covered under this Section makes that part of the "residence premises" rented to others or held for rental by you not fit to live in, we cover the:

   Fair Rental Value,' meaning the fair rental value of that part of the "residence premises" rented to others or held for rental by, you less any expenses that do not continue while' the premises is not fit to live in,

Payment will be for the shortest time required to repair or replace that part' of the premises rented or held for rental.

3. If a civil authority prohibits you from use of the "residence premises" as a result of direct damage to neighboring premises by a Peril Insured Against in this policy, we cover the Additional Living Expense and Fair Rental Value loss as provided under 1. and 2. above for no more than two weeks.

The periods of time under 1., 2. and 3. above are not limited by expiration of this policy.

We do not cover loss or expense due to cancellation of a lease or agreement.

ADDITIONAL COVERAGES

1. Debris Removal. We will pay your reasonable expense for the removal of:

   a. Debris of covered property if a Peril Insured Against that applies to the damaged property causes the loss; or

   b. Ash, dust or particles 'from a volcanic eruption that has caused direct toss to a building or property contained in a building.

   This expense is included in the limit of liability that applies to the damaged property. If the amount to be paid for the actual damage to the property plus the debris removal expense is more than the lirnit of liability for the damaged property, an additional 5% of that limit of liability is available for debris removal expense.

We will also pay your reasonable expense, up to $500, for the removal from the "residence premises" of:

a. Your tree(s) felled by the peril of Windstorm or Hail;

b. Your tree(s) felled by the peril of Weight of Ice, Snow or Sleet; or

c. A neighbors tree(s) felled, by a Peril Insured Against under Coverage C;

provided the tree(s) damages a covered structure. The $500 limit is the most we will pay in any one loss regardless of the number of fallen trees.

2. Reasonable Repairs. In the event that covered property is damaged by an applicable Peril Insured Against, we will pay the. reasonable cost incurred by you for necessary measures taken solely to protect against further damage. if the measures taken involve repair to other damaged property; we will pay for those measures only if that properly Is covered under this policy and the damage to that property is caused by an applicable Peril Insured Against.

This coverage:

a. Does not Increase the limit of liability that applies to the covered property;

b. Does not relieve you of your duties, in case of a loss to covered' property, as set forth in SECTION 1-CONDITION 2.d.

3. Trees, Shrubs and Other Plants. We cover trees, shrubs, plants or lawns, on the "residence premises," for toss caused by the following Perils Insured Against: Fire or lightning, Explosion, Riot

or civil commotion, Aircraft, Vehicles not owned or operated by a resident of the 'residence premises," Vandalism or malicious mischief or Theft.

We will pay up to 5% of the limit of liability that applies to the dwelling for all trees, shrubs, plants or lawns. No more than $500 of this limit will be available for any one tree, shrub or plant. We do not cover property grown for "business" purposes.

This coverage is additional insurance.

4. Fire Department Service Charge. We will pay up to $500 for your liability assumed by contract or agreement for fire department charges incurred when the fire department is called to save or protest covered property Win a Peril Insured Against. We do not cover fire department service charges if the property is located within the limits of the city, municipality or protection district furnishing the fire department response.

   This coverage is additional insurance. No deductible applies to this coverage.

5. Property Removed. We insure covered property against direct loss from any cause while being removed from a premises endangered by a Peril Insured Against and for no more than 30 days while removed. This coverage does not change the limit of liability' that applies to the property being removed.

6. Credit Card, Fund Transfer Card, Forgery and Counterfeit Money.

We will pay up to $500 for:

   a. The legal obligation of an Insured" to pay because of the theft or unauthorized use of credit

cards issued to or registered in an "insured's" name;

b. Loss resulting from 'theft or unauthorized use of a fund transfer card used for deposit, withdrawal or transfer of funds, issued to or registered in an "insured's" name;

c. Loss to an "insured" caused by forgery or alteration of any check or negotiable instrument; and

d. Loss to an "insured" through acceptance In good faith of counterfeit United States or Canadian paper currency.

We do not cover use of a credit card or fund transfer card:

a. By a resident of your household:

b. By a person who has been entrusted with either type of card; or

c. If an "insured" has not complied with all terms and conditions under which the cards are issued.

All loss resulting from a series of acts committed by any one person or in which any one person is concerned or implicated is considered to be one loss.

We do not cover loss arising out of "business" use or dishonesty of an "insured."

This coverage is additional insurance. No deductible applies to this coverage.

Defense:

a. We may investigate and settle any claim or suit that we decide is appropriate. Our duty to

defend a claim or suit ends when the amount we pay for the loss equals our limit of liability.

b. If a suit is brought against an Insured" for, liability under the Credit Card or Fund Transfer Card coverage, we will provide a defense at our expense by counsel of our choice.

c. We have the option to defend at our expense an "insured" or an "insured's" bank against any suit for the enforcement of payment under the Forgery coverage.

7. Loss Assessment. We will pay up to $1000 for your share of loss assessment charged during the policy period against you by a corporation or association of properly owners, when the assessment is made as a result of direct loss to the property, owned by all members collectively, caused by a Peril Insured Against under COVERAGE A—DWELLING, other than earthquake or land shock wave's or tremors before, during or after a volcanic eruption.

This coverage applies only to loss assessments charged against you as owner or tenant of the "residence premises".

We do- not Cover loss assessments charged against you or a corporation or association of property owners by any governmental body.

The limit of $1000 is the most we will pay with respect to any one loss, regardless of the number of assessments.

Condition 1. Policy Period, under SECTIONS I AND II CONDITIONS, does not apply to this coverage.

8. Collapse. We insure for direct physical loss to covered property involving collapse of a building or any part of a building caused only by one or more of the following:

   a. Perils Insured Against in COVERAGE C — PERSONAL PROPERTY. These perils apply to covered buildings and personal property for loss insured by this additional coverage;

   b. Hidden decay:

   c. Hidden insect or vermin damage;

   d. Weight of contents, equipment, animals or people;

   e. Weight of rain which collects on a roof; or'

   f. Use of defective material or methods in construction, remodeling or renovation if the collapse occurs during the course of the construction, remodeling or renovation.

   Loss to an awning, fence, patio, pavement, swimming pool, underground pipe, flue, drain, cesspool, septic tank, foundation, retaining wall, bulkhead, pier, wharf or dock is not included under items b., c., d., e., and f. unless the loss is a direct result of the collapse of a building.

   Collapse does not include settling, cracking, shrinking, bulging or expansion.

   This coverage does not increase the limit of liability applying to the damaged covered property.

9. Glass or Safety Glazing Material.

We cover:

a. The breakage of glass or safety. glazing material which is part of a covered building, storm door or storm window; and

b. Damage to covered property by glass or safety glazing material which is part of a building, storm door or storm window.

This coverage does not include loss on the "residence premises" if the dwelling has been vacant for more than 30 consecutive days immediately before the toss. A dwelling being constructed is not considered vacant.

Loss for damage to glass will be settled on the basis of replacement with safety glazing materials when required by ordinance or law.

This coverage does not increase the limit of liability that applies to the damaged property.

10. Landlord's Furnishings. We will pay up to $2500 for your appliances, carpeting and other household furnishings, in an apartment on the "residence premises' regularly rented or held for rental to others by an "insured," for loss caused only by the following Perils Insured Against:

a. Fire or lightning.

b. Windstorm or hail.

This peril does not include loss to the properly contained in a building caused by rain, snow, sleet, sand or dust unless the direct force of wind or hail damages the building causing an opening in a roof or wall and the rain, snow, sleet, sand or dust enters through this opening.

This peril includes loss to watercraft and their trailers, furnishings, equipment, and outboard

engines or motors, only while inside a fully enclosed

c. Explosion.

d. Riot or civil commotion.

e. Aircraft, including self-propelled missiles and spacecraft.

f. Vehicles.

g. Smoke, meaning sudden and accidental damage from smoke

This peril does not include loss caused by smoke from agricultural smudging or industrial operations.

h. Vandalism or malicious mischief.

i. Falling objects.

This peril does not include loss to property contained in a building unless the roof or an outside wall of the building is first damaged by a falling object. Damage to the falling object itself is not Included.

j. Weight of ice, snow or sleet which causes damage to property contained in a building.

k. Accidental discharge or overflow of water or steam from within a plumbing, heating, air conditioning or automatic fire protective sprinkler system or. from within a household appliance.

This peril does not include loss:

(1) To the system or appliance from which the water or steam escaped;

(2) Caused by or resulting from freezing except as provided in the peril of freezing below: or

(3) On the "residence premises" caused by accidental discharge or overflow which occurs off the "residence premises."

In this peril, a plumbing system does not include a sump, sump pump or related equipment.

l. Sudden and accidental tearing apart, cracking, burning or bulging of a steam or hot water heating system, an air conditioning or automatic fire protective sprinkler system, or an appliance for heating water.

We do not cover loss caused by or resulting from freezing under this peril.

m. Freezing of a plumbing, heating, air conditioning or automatic fire protective sprinkler system-or of a household appliance.

This peril does not include loss on the residence premises': while the dwelling is unoccupied, unless you have used reasonable care to:

(1) Maintain heat in the building: or

(2) Shut off the water supply and drain the system and appliances of water.

n. Sudden and accidental damage from artificially generated electrical current.

This peril does not include loss to a tube, (transistor or similar electronic component).

o. Volcanic eruption other than_ loss caused by earthquake, land shock waves or tremors.

The $2500 limit is the most we will pay in any one loss regardless of the number of appliances; carpeting or other household furnishings involved in the loss.

SECTION I —PERILS INSURED AGAINST

COVERAGE A — DWELLING and COVERAGE B — OTHER STRUCTURES

We insure against risk of direct loss to properly described in Coverages A and B only if that loss is a physical loss to property. We do not insure, however, for loss:

1. Involving collapse, other than as provided in Additional Coverage Be
2. Caused by:
   a. Freezing of a plumbing, heating, air conditioning or automatic fire protective sprinkler system or of a household appliance, or by discharge, leakage or overflow from within the system or appliance caused by freezing. This exclusion applies only while the dwelling is vacant, unoccupied or being constructed, unless you have used reasonable care to:
      (1) Maintain heat in the building; or
      (2) Shut off the water supply and drain the system and appliances of water;
   b. 'Freezing, thawing, pressure or weight of water or ice, whether driven by wind or not, to a:
      (1) Fence, pavement, patio or swimming pool;
      (2) Foundation, retaining wall, or bulkhead; or
      (3) Pier, wharf or dock;

c. Theft in or to a dwelling under construction, or of materials and supplies: for use in the construction until the dwelling is finished and occupied;

d. Vandalism and malicious mischief if the dwelling has been vacant for more than 30 consecutive days immediately before the loss. A dwelling being constructed is not considered vacant,

e. Any of the following:

(1) Wear and tear, marring, deterioration;

(2) Inherent vice, latent defect, mechanical breakdown;

(3) Smog, rust or other corrosion, mold, wet or dry rot;

(4) Smoke from agricultural smudging or industrial operations;

(5) Discharge, dispersal, seepage, migration, release or escape of pollutants unless the discharge, dispersal, seepage, migration, release or escape is itself caused by a Peril Insured Against under Coverage C of this policy.

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and Waste. Waste includes materials to be recycled, reconditioned or reclaimed;

(6) Settling, shrinking, bulging or expansion, including resultant cracking, of pavements, patio's, foundations, walls, floors, roofs or ceilings;

(7) Birds, vermin, rodents, or insects; or

(8) Animals owned or kept by an "Insured." If any of these cause water damage not otherwise excluded, from a plumbing, heating, air conditioning or automatic tire protective spire Kier system or household appliance, we cover loss caused by the water including the cost of tearing out and replacing any part of a building necessary to repair the system or appliance_ We do not cover loss to the system or appliance from which this water escaped.

3. Excluded under Section 1 — Exclusions,

Under items 1. and 2., any ensuing loss to property described in Coverages A and B not excluded or excepted in this policy is covered.

COVERAGE C — PERSONAL PROPERTY

We insure for direct physical loss to the property 'described in Coverage C caused by a peril listed below unless the loss is excluded in SECTION I — EXCLUSIONS.

1. Fire or lightning.
2. Windstorm or hail.

   This peril does not include loss to the property contained in a building caused by rain, snow, sleet, sand or dust unless the direct force of wind or hail damages the building causing an opening in a roof or wall and the rain, snow, sleet, sand or dust enters through this opening.

   This peril includes loss to watercraft and their trailers, furnishings, equipment, and outboard

engine's or motors, only while inside a fully enclosed building.

3. Explosion.
4. Riot or civil commotion
5. Aircraft, including self-propelled missiles and spacecraft.
6. Vehicles.
7. Smoke, meaning sudden and accidental damage from smoke.

   This peril does not include toss caused by smoke from agricultural smudging or industrial Operations.
8. Vandalism or malicious mischief.
9. Theft, including attempted theft and loss of property from a known place when it is likely that the property has been stolen.

   This peril does not include loss caused by theft:

   a. Committed by an "insured";

   b. In or to a dwelling under construction, or of materials and supplies for use in the construction until the dwelling is finished and occupied; or

   c. From that part of a "residence premises" rented by an "insured" to other than an "insured."

   This peril does not include 'loss caused by theft that occurs off the "residence premises" of:

   a. Property while at. any other residence owned by, rented to, or occupied by an Insured, except while an "insured' is temporarily living there.

Property of a student who is an "insured" is covered while at a residence away from home if the student has been there at any time during the 45 days immediately before the loss,

b. Watercraft, and their furnishings, equipment and outboard engines or motors; or

c. Trailers and campers,

10. Falling objects.

This peril does not include loss to property contained in a building unless the roof or an outside wall of the building is first damaged by a falling object. Damage to the falling object itself is not included:

11. Weight of ice, snow or sleet which causes damage to properly contained in a building.

12. Accidental discharge or overflow of water or steam from within a plumbing, heating, air conditioning or automatic fire protective sprinkler system or from within a household appliance.

This peril does not include loss:

a. To the system or appliance from which the water or steam escaped;

b. Caused by or resulting from freezing except as provided in the peril of freezing below; or

c. On the "residence premises' caused by accidental discharge or overflow which occurs off the "residence premises."

In this peril, a plumbing .system does not include a sump, sump pump or related equipment,

13. Sudden and accidental tearing apart, cracking, burning or bulging of a steam or-hot water

heating system, an air conditioning or automatic fire protective sprinkler system, or an appliance for heating water.

We do not cover loss caused by or resulting from freezing under this peril.

14. Freezing of 'a plumbing, heating, air conditioning or automatic fire protective sprinkler system or of a household appliance. a

This peril does not include loss on the "residence premises" While the dwelling is unoccupied, unless you have used reasonable care to:

a. Maintain heat in the building; or

b, Shut off the water supply and drain the system and appliances of water.

15. Sudden and accidental damage from artificially generated electrical current.

This peril does not include loss to a tube, transistor or similar electronic component.

16. Volcanic eruption other than loss caused by earthquake, land shock waves or tremors.

SECTION l a EXCLUSIONS

1. We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any 'other cause or event contributing concurrently or in any sequence to the loss.

   a. Ordinance or Law, Meaning enforcement of any ordinance or law regulating the construction, repair, or demolition of a building or other structure, unless specifically provided under this policy.

b. Earth Movement, meaning earthquake- including land shock waves or tremors before, during or after a volcanic eruption; landslide; mine subsidence; mudflow; earth sinking, rising or shifting; unless direct loss by:

(1) Fire;

(2) Explosion; or

(3) Breakage of glass or safety glazing material which is part of a 'building, storm door or storm window;

ensues and then we will pay only for the ensuing loss.

This exclusion does not apply to loss by theft. c. Water Damage, meaning:

c. Water Damage, meaning

(1) Flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind;

(2) Water which backs up through sewers or drains or which overflows from a sump; or

(3) Water below the surface of the ground, including water which exerts pressure on or seeps or leeks through a building, sidewalk, driveway, foundation, swimming pool or other structure.

Direct loss by fire, explosion or. theft resulting from water damage is covered.

d. Power Failure, meaning the failure of power or other utility service if the failure takes place off the "residence premises." But, if a Peril In-

sured Against ensues on the "residence premises," we will pay Only for that ensuing loss.

e. Neglect, meaning neglect of the "insured' to use all reasonable means to save and preserve property at and after the time of a loss.

f. War, including the following and any consequence of any of the following:•

(1) Undeclared war, civil war, insurrection, rebellion or revolution;

(2) Warlike act by a military- force or military personnel; or

(3) Destruction, seizure or use for a military purpose.

Discharge of a nuclear weapon will be deemed a warlike act even if accidental.

g. Nuclear Hazard, to the extent set forth in the Nuclear Hazard Clause of SECTION I — CONDITIONS

h. Intentional Loss, meaning any loss arising out of any act committed:

(1) By or at the direction of an "insured"; and

(2) With the intent to cause a loss.

2. We do not insure for loss to property described in Coverages A and B caused by any of the following. However, any ensuing loss to property described in Coverages A and B not excluded pr excepted in this policy is covered.

a. Weather conditions. However, this exclusion only applies if weather conditions contribute in any way with a cause or event excluded in paragraph 1. above to produce the loss;

b. Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body;

c. Faulty, inadequate defective:

(1) Planning, zoning, development, surveying, siting;

(2) Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;

(3) Materials used in repair, construction, renovation or remodeling; or

(4) Maintenance;

of part or all of any property whether on or off the "residence premises."

SECTION I — CONDITIONS

1. Insurable Interest and Limit of Liability. Even if more than one person has an insurable interest in the property covered, we will not be liable in any one loss:

a. To the "Insured" for more than the amount of the "insured's" interest at the time of loss; or

b. For more than the applicable limit of liability.

2. Your Duties After Loss. In case of a loss to covered property, you roust see that the Following are done:

a. Give prompt notice to us or our agent;

b. Notify the police in case of loss by theft;

c. Notify the credit card or fund transfer card company in case of loss under Credit Card or Fund Transfer Card coverage;

d. Protect the property from further damage. If repairs to the property are required, you must:

(1) Make reasonable and necessary repairs to protect the property, and

(2) Keep an accurate record of repair record

e. Prepare an inventory of damaged personal property showing the quantity, description, actual cash value and amount of loss. Attach all bills, receipts and relate documents that justify the figures in the inventory.

f. As often as we reasonably require:

(1) Show the damaged properly;

(2) Provide us with records and documents we request and permit us to make copies; and

(3) Submit to examination under oath, while not in the presence of any other "insured" and sign the same.

g. Send to us, within BO days after our request, your signed, sworn proof of loss which sets forth, to the best of your knowledge and belief:

(1) The time and cause of loss;

(2) The interest of the "insured" and all others in the properly involved and all liens on the property;

(3) Other insurance which may cover the loss;

(4) Changes In title or occupancy of the property during the term of the policy;

(5) Specifications of damaged buildings and detailed repair estimates;

(6) The inventory of damaged personal property described in 2.e. above;

(7) Receipts for additional living expenses incurred and records that support the fair rental value toss; and

(8) Evidence or affidavit that, supports a claim under the Credit Card, Fund Transfer Card, Forgery and Counterfeit Money coverage stating the amount and cause of loss.

3. Loss Settlement Covered property losses are settled as follows;

a. Property of the following types:

(1) Personal property;

(2) Awnings, carpeting, household appliances, outdoor antennas and outdoor equipment, whether or not attached to buildings: and

(3) Structures that are not buildings;

at actual cash value at the 'time of loss but not more than the amount required to repair or replace:

b. Buildings under Coverage A or B at replacemerit cast without deduction for depreciation; subject to the following:

(1) if, at the time of loss, the amount of Irmo- - ance in this policy on the damaged building is '80% or more of the full replacement cost of the building immediately before the loss, we will pay the lost to repair or replace, after application of deductible and without deduction for depreciation, but not more than the least of the following amounts:

(a) The limit of liability under this policy that applies to the building;

(b) The replacement cost of that part Of the building damaged for like construction and use on the same premises; or

(c) The necessary amount actually spent to repair or replace the damaged building.

(2) If, at the time of loss, the amount of insurance in this policy on the damaged building is less than 80% of the full replacement cost of the building immediately before the loss, we will pay the greater of the following amounts, but not more than the limit of ability under this policy that applies to the building:

(a) The actual cash value of that part of the building damaged; or

(b) That proportion, of the cost to repair or replace; after application of deductible and without deduction for depreciation, that part of the building damaged, which the total amount of insurance in this policy on the damaged building bears to 80% of the replacement cost of the building.

(3) To determine the amount of insurance required to equal 80% of the full replacement cost of the building immediately before the loss, do not Include the value of:

(a) Excavations, foundations, piers or any supports which are below the undersurface of the lowest basement floor;

(b) Those supports in (a) above' which are below the surface of the ground inside the foundation walls, if there is no basement; and

(c) Underground flues, pipes, wiring and drains.

(4) We will pay no more than the actual cash value of the damage until actual repair or replacement. is complete. Once 'actual re pair or replacement is complete, we will set tie the kiss according to the provisions of b.(1) and b.(2) above.

However, If the cost to repair or replace the damage is both:

(a) Less than 5% of the amount of insurance in this policy on the building; and

(b) Less than $2500;

we will settle the loss according to the provisions of b.(1) and b.(2) above whether or not actual repair or replacement is complete.

(5) You may disregard the replacement cost loss settlement provisions and make claim under this policy for loss or damage to buildings on an actual cash value basis. You may then make claim within 180 days after loss for any additional liability according to the provisions of this Condition 3. Loss Settlement.

4. Loss to a Pair or Set. In case of loss to a pair or set we may elect to:

a. Repair or replace any part to restore the pair or set to its value before the loss; or

b. Pay the difference between actual cash value of the property before and after the loss.

5. Glass Replacement. Loss for damage to glass caused by a Peril insured Against will be settled on the basis of replacement with safety glazing materials when required by ordinance or law.

6. Appraisal. If you and we fail to agree on the amount of loss, either may demand an appraisal of the loss. In this event, each party will choose a competent appraiser within 20 days after receiving a written request from the other. Tne two appraisers will choose an umpire. If they cannot agree upon an umpire within 15 days, you or we may request that the choice be made by a judge 'of a court of record in the state where the "residence premises" is located. The appraisers will separately set the amount of loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon will be the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will set the amount of loss.

   Each party will:

   a. Pay its own appraiser and

   b. Bear the other expenses of the appraisal and umpire equally.

7. Other Insurance. If a loss covered by this policy is also covered by other insurance, we will pay only the proportion of the loss that the limit of liability that applies under this policy bears to the total amount of insurance covering the loss.

8. Suit Against Us. No action can be brought unless the policy provisions have been complied with and the action is started within one year after the date of loss.

9. Our Option. It we give you written notice within 30 days after we receive your signed, sworn proof of. loss, we may repair or replace any part of the damaged property with like property.

10. Loss Payment, We will adjust all losses with you. We will pay you unless some other person is named in the policy or is legally entitled to receive payment. Loss will be payable 60 days after we receive your proof of loss and:

    a. Reach an agreement with you;

    b. There is an entry of a final judgment; or c. There is a filing of an appraisal award with us.

11. Abandonment of Property. We need not accept any property abandoned by an "insured."

12. Mortgage Clause.

    The word "mortgagee" includes trustee.

    If a mortgagee is named in this policy, any loss payable under Coverage A or 13 will be paid to the mortgagee and you, as interests appear. If more than one mortgagee is earned, the order of payment will be the same as the order of precedence of the mortgages. -

    If we deny your claim, that denial will not apply to a valid claim of the mortgagee, if the mortgagee:

    a. Notifies us of any change in ownership, occupancy or substantial change in risk of which the mortgagee is aware;

b. Pays any premium due under this policy on demand It you have neglected to pay the premium; and'

c. Submits a signed, sworn statement of loss within 60 days after receiving notice from us of your failure to do so. Policy conditions relating to Appraisal, Suit- Against Us and Loss Payment apply to the mortgagee.

If we decide to cancel or not to renew. this policy, the mortgagee wilt be notified at least 10 days before the date cancellation or nonrenewal takes effect.

If we pay the mortgagee for any loss and deny payment to you:

a: We are subrogated to all the rights of the mortgagee granted under the mortgage on the property; or

b. At our option, we may pay to the mortgagee the whole principal on the mortgage plus any accrued interest. In this event, we will receive a full assignment and transfer Of the mortgage and all securities held as collateral to the friedgage debt.

Subrogation will not impair the right of the mortgagee to recover the full amount of the mortgagee's claim.

13. No Benefit to Bailee. We will not recognize any assignment or grant any coverage that benefits a person or organization holding, storing or moving property for a fee regardless of any other provision of this policy.

14. Nuclear Hazard Clause.

a. "Nuclear Hazard" means any nuclear reaction, radiation, or radioactive contamination, all whether controlled or uncontrolled or however caused, or any consequence of any of these.

b. Loss caused by the nuclear hazard will not be considered loss caused by fire, explosion, or smoke, whether theta perils are specifically named in or otherwise included within the Perils Insured Against in Section 1.

c. This policy does not apply under Section 1 to lost caused directly or indirectly by nuclear hazard, except that direct loss by fire resulting from the nuclear hazard is covered.

15. Recovered Property. If you or we recover any property for which we have made payment under this policy, you or we will notify the other of the recovery. At your option, the property will be returned to or retained by you or it will become our property. If the recovered property is returned to or retained by you, the loss payment will be adjusted based on the amount you received for the recovered property.

16. Volcanic Eruption Period. One or more volcanic. eruptions that occur within a 72-hour period will be considered as one volcanic eruption.

SECTION II — LIABILITY COVERAGES

COVERAGE E Personal Liability

If a claim is made or a suit is brought against an "insured for damages because of "bodily injury" or "property damage" caused by an "occurrence" to which this coverage applies, we will:

1. Pay up to our limit of liability for the damages for which the "insured" is legally liable. Damages in-

clude prejudgment interest awarded against the "insured"; and

2. Provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent. WO may investigate and settle any claim or suit that we decide is appropriate. Our duty to settle or defend ends when the amount we pay for damages resulting from the 'occurrence" equals our limit of liability.

COVERAGE F Medical Payments To. Others

We will pay the necessary medical -expenses that are incurred or medically ascertained within three years from the date of an accident causing "bodily injury." Medical• expenses means reasonable charges for Medical, surgical, x-ray, dental, ambulance, hospital, professional nursing, prosthetic devices and funeral services. This coverage' does not apply to you or. regular residents of your household except "residence employees." As to others, this coverage applies only:

1. To a person on the Insured location" with the permission of an "insured"; or
2. To a person off the "insured location," if the "bodily injury":
   a. Arises out of a condition on the "insured location" or the ways immediately adjoining;
   b. Is caused by the activities of an "insured";.
   c. Is caused by a "residence employee" in the course of the "residence employee's" employment by an Insured"; or
   d. Is caused by an animal owned by or in the care of an "insured.'

SECTION II — EXCLUSIONS

1. Coverage E - Personal Liability and Coverage F — Medical Payments to Others do not apply to "bodily injury" or "property damage":

   a. Which is expected or intended by the "insured";

   b. Arising out of or in connection with a "business" engaged in by an "Insured." This exclusion applies but is not limited to an act or omission, regardless of Its nature or circumstance, involving a service or duty rendered, promised, owed, or implied to be provided because of the nature of the "business";

   c. Arising out of the rental or holding for rental of any part of any premises by an Insured." This exclusion does not apply to the rental or holding for rental of an "insured location":

      (1) On an occasional basis if used only as a residence;

      (2) In part for use onlyas a residence. unless a single family unit is intended for use by the occupying family to lodge more than two roomers or boarders; or

      (3) In part; as an office, school, studio or private garage;

   d. Arising out of the rendering of or failure to render professional services;

   e. Arising out of a premises:

      (1) Owned by an "insured";

      (2) Rented to an "insured"; or

      (3) Rented to others by an "insured"; that is not an Insured location";

   f. Arising out of:

(1) The ownership, maintenance, use, loading or unloading of motor vehicles or all other motorized land conveyances, including trailers, owned or operated by or rented or loaned to an "insured";

(2) The entrustment by an "insured" of a motor vehicle or any other motorized land conveyance to any person; or

(3) Vicarious liability, whether or not statutorily imposed, for the actions of a child or minor using a conveyance excluded In paragraph (1) or (2) above.

This exclusion does not apply to;

(1) A trailer not towed by or carried on a Motorized land conveyance.

(2) A motorized land conveyance designed for recreational use off public roads, not subject to motor vehicle registration and:

(a) Not owned by art Insured"; or

(b) Owned by an Insured" and on an Insured location";

(3) A Motorized golf cart when used to play golf on a golf course;

(4) A vehicle or conveyance not subject to motor vehicle registration which is:

(a) Used to service an "insured's" residence;

(b) Designed for assisting the handicapped; or

(c) In dead storage on an "insured location";

g. Arising put of:

(1) The ownership, maintenance, use, loading, or unloading of an excluded watercraft described below;

(2) The entrustment by an "insured" of an watercraft described to any person; or

(3) Vicarious liability, whether or not statutorily imposed, for the actions of a child or minor using an excluded watercraft described below

Excluded watercraft are those that are principally designed to be propelled by engine power or electric motor or are sailing vessels whether owned by or rented to an "insured. This exclusion does not apply to watercraft:

(1) that are not sailing vessels and are powered by:

(a) Inboard or inboard-outdrive engine or motor power of 50 horsepower or less not owned by "insured";

(b) Inboard or inboard-outdrive engine or motor power of 50 horsepower or more not rented to "insured";

(c) One or more outboard engines or motors with 25 total horsepower

(d) One or more outboard engines or motors with more than 25 horsepower owned by an "insured" if:

(i) You acquire them prior to the policy period; and

(a) You declare them at policy inception; or

(b) Your intention to insure is reported to us in writing within 45 days after you acquire the outboard engines or motors.

(ii) You acquire them during the policy period

This coverage applies for the policy period.

(2) that are sailing vessels, with, or without auxiliary power:

(a) Less than 26 feet in overall length;

(b) 26 feet or more in overall length, not owned by or rented to an "insured."

(3) that are stored;

h. Arising out of:

(1) The ownership, maintenance, use, loading or unloading of an aircraft.

(2) The entrustment by an "insured" of an aircraft to any person; or

(3) Vicarious liability, whether or not statutorily imposed, for the actions of a child or minor using an aircraft.

i. Caused directly or indirectly by war, including the following and any consequence of any of the following

(1) Undeclared war, civil war, insurrection, rebellion or revolution

j. Which arises out of the transmission of a communicable disease by an "insured";

k. Arising out of sexual molestation, corporal punishment or physical or mental abuse; or

l. Arising out of the use, sale, manufacture, delivery, transfer or possession by any person of a Controlled Substance(s) as defined by the Federal 'Food and Drug Law at 21 U.S.C.A. Sections 811 and 812. Controlled Substances include but are not limited to cocaine, LSD, marijuana and all narcotic drugs. However, this exclusion does not apply to the legitimate use of prescription drugs by a person following the orders of a licensed physician.

Exclusions e., f., g., and h. do not apply to "bodily injury" to a "residence -employee" arising out of and in the course of the "residence employee's.' employment by an "insured."

2. Coverage E— Personal Liability, does not apply to:

a. Liability:

(1) For any loss assessment charged against you as a member of an association, corporation or community of property owners;

(2) Under any contract or agreement. However, this exclusion does not apply to written contracts:

(a) That directly relate to the ownership, maintenance or use of an "insured location"; or

(b) Where the liability of others is assumed by the "insured" prior to an "occurrence"; unless excluded in (1) above or elsewhere in this policy,

b. "Property damage" to property owned by the "insured";

c. "Property damage" to property rented to, occupied or used by or in the care of the "insured." This exclusion does not apply to "property damage" caused by fire, smoke or explosion;

d. "Bodily injury" to any person eligible to receive any benefits:

(1) Voluntarily provided; or

(2) Required to be provided;

by the "insured" under any.

(1) Workers' compensation law;

(2) Non-occupational disability law; or

(3) Occupational disease law;

e. "Bodily injury" or "property' damage" for which an "insured" under this policy:

(1) Is also an insured under a nuclear energy liability policy; or

(2) Would be art insured under that policy but for the exhaustion of its limit of liability.

A nuclear energy liability policy is one issued by.

(1) American Nuclear Insurers;

(2) Mutual Atomic_ Energy Liability Underwriters; .

(3) Nuclear. Insurance Association of Canada.; or any of their successors; or

f. "Bodily injury" to you or an "insured" within the meaning of part a_ or b. of Insured" as defined.

3. Coverage F — Medical Payments to Others, does not apply to "bodily injury":

a. To a "residence employee" if the "bodily injury":

(1) Occurs off the "insured location"; and

(2) Does net arise out of or in the course of the "residence employee's" employment by an "insured";

b. To any person eligible to receive benefits:

(1) Voluntarily provided; or

(2) Required to be provided;

under any:

(1) Workers' compensation law;

(2) Non-occupational disaoility law; or

(3) Occupational disease law;

c. From any:

(1) Nuclear reaction;

(2) Nuclear radiation; or

(3) Radioactive contamination;

all whether controlled or uncontrolled or however caused; or

(4) Any consequence of any of these; or

d. To any person, other than a 'residence employee" of an "Insured," regularly residing on any part of the "insured location."

SECTION II — ADDITIONAL COVERAGES

We cover the following in addition to the limits of liability:

1. Claim Expenses. We pay:

   a. Expenses we incur end costs taxed against an "insured" in any suit we defend;

   b. Premiums on bonds required in a suit we defend, but not for bond amounts more than the limit of liability for Coverage E. We need not apply for or furnish any bond;

   c. Reasonable expenses incurred by an "insured" -at our request, including actual loss of earnings (but not loss of other income) up to $50 per day, for assisting us in the investigation or defense of a claim or suit; and

   d. Interest on the entire judgment which accrues after entry of the judgment and before we pay, or tender, or deposit in court that part of the judgment which does not exceed the limit of liability that applies..

2. First Aid Expenses. We will pay expenses for first aid to others Incurred by an- "insured" for "bodily injury" covered under. this policy. We will not pay for first aid to you or any other "insured."

3. Damage to Property of Others. We will pay, at replacement cost, up to $50a per "occurrence", for 'property damage" to property of others caused by an 'insured."

   We will not pay for "property damage":

   a. To the extent of any amount recoverable under Section], of this policy;

b. caused intentionally by an Insured" who is 13 years of age or older;

c. To property owned by an "insured";

d. To property owned by or rented to a tenant of an Insured" or a resident in your household; or

e. Arising out of:

(1) A "business" engaged in by an "insured";

(2) Any act, or omission in connection with a premises owned, rented or controlled by an "insured," other than the "insured location"; or

(3) The ownership, maintenance,- or use of aircraft, watercraft or motor vehicles or all other motorized land conveyances:

This exclusion does not apply to a motorized land conveyance designed for recreational use off public roads, not subject to motor vehicle registration arid not owned by an "insured."

4. Loss Assessment. We will pay up to $1600 for your share of loss assessment charged during the policy period against you by a corporation or association of property owners, when the assessment is made as a result of:

a. "Bodily Injury" or "property damage" not excluded under Section II of this policy; or

b. Liability for an -act of a director, officer 'or trustee In the capacity as a director, officer or trustee, provided:

(1) The director, officer or trustee is elected by the members of a corporation or association of property owners; and

(2) The. director, officer or trustee serves without deriving any income from the exercise of duties which are solely on behalf of a corporation .or association of property owners..

This coverage applies only to loss assessments charged against you as owner or tenant of the "residence premises".

We do not cover loss assessments charged against you or a corporation or association of property owners by any governmental body.

Regardless of the number of assessments, the knit of $1000 is the most we will pay for loss arising out of:

a. One accident, including continuous or repeated exposure to substantially the same general harmful condition; or

b. A covered act of a director, officer or trustee. An act involving more than one director, officer or trustee is considered to be a single act.

The following do not apply to this coverage:

1. Section II - Coverage E - Personal Liability Exclusion 2.a.(1);

2. Condition 1. Policy Period, under SECTIONS I AND II - CONDITIONS.

SECTION II - CONDITIONS

1. Limit of Liability, Our total liability under Coverage E for all damages resulting from any one "occurrence" will not be more than the limit Of liability for Coverage E as shown in the Declarations. This limit is the seine regardless of the number of "insured's," claims made or persons injured: All

"bodily injury" and "property damage" resulting from any one accident or from continuous or repeated exposure to substantially the same general harmful Conditions shall be considered to be the result of and "occurrence."

Our total liability under. Coverage F for all medical expense payable for "bodily injury! to one person as .the result of one accident will not be more than the limit of liability for Coverage F as shown in the Declarations.

2. Severability of Insurance. This Insurance applies separately to each Insured: This condition will not increase our limit of liability for any one "occurrence."

3. Duties After Loss. in case of an accident or "occurrence," the "insured" will perform the following duties that apply. You will help us by seeing that these duties are performed:

   a. Give written notice to us or our agent as soon as is practical, which sets forth:

      (1) The identity of the policy and Insured";

      (2) Reasonably available information on the time, piece and circumstances 'of the accident or "occurrence"; and

      (3) Names and addresses of any claimants and witnesses;

   b. Promptly forward to us every notice, demand, summons or other process relating to the accident or "occurrence";

   c. At our request, help us:

      (1) To make settlement;

(2) To enforce any right of contribution or indemnity against any person or organization who may be liable to an "insured";

(3) With the conduct of suits and attend hearings and trials; and

(4) To secure and give evidence and obtain the attendance of witnesses;

d. Under the coverage - Damage to Property of Others - submit to us within 60 days after the loss, a sworn statement of loss and show the damaged property, if In the "insured's" control;

e. The "insured" will not, except at the "insured's" own cost, .Voluntarily, make payment, assume obligation or incur expense other than for first aid to others at the tim e of the "bodily injury"

4. Duties of an injured Person - Coverage F - Medical Payments to Others.

The injured person or someone acting for the injured person will:

a. Give us written proof of claim, under oath if required, as soon as is practical; and

b. Authorize us to obtain copies of medical reports and records.

The injured person will submit to a physical exam by a doctor of our choice when and as often as we reasonably require,

5. Payment of Claim - Coverage F - Medical Payments to Others. Payment under this coverage is not an admission of liability by an 'insured" or us.

6. Suit Against Us. No action can be brought against us unless there has been compliance with the policy provisions.

   No one will have the right to join us as a party to any action- against an Insured." Also, no action with respect to Coverages can be brought against us until the obligation of the "insured" has been determined by final judgment or agreement signed by us.

7. Bankruptcy of an Insured. Bankruptcy or insolvency of an "insured" will not relieve us of our obligations under this policy.

8. Other Insurance — Coverage E — Personal Liability. This insurance is excess over other valid and collectible insurance except insurance written specifically to cover as excess over the limits of liability that apply in this policy.

SECTIONS I AND II CONDITIONS

1. Policy Period. This policy applies only to loss in Section 1 or "bodily injury" or "property damage" in Section II, which occurs during the policy period.

2. Concealment or Fraud. The entire policy will be void If, whether before or after a loss, an Insured" has:

   a. Intentionally concealed or misrepresented any material fact or circumstance;

   b. Engaged in fraudulent conduct; or

   c. Made false statements; relating to this insurance.

3. Liberalization Clause. if we make a change which broadens coverage under this edition of our policy

without additional premium charge, that change will automatically apply to your insurance as of the date we implement the change in your state, provided that this Implementation date falls within 60 days prior to or during the policy period stated in the Declarations.

This Liberalization Clause does not apply to changes implemented through introduction of a subsequent edition of our policy.

4. Waiver or Change of Policy Provisions.

A waiver or change or a provision of this policy must be in writing by us to be valid. Our request for an appraisal or examination will not waive any of our rights.

5. Cancellation

a. You may cancel this policy at any time by re" turning it to us or by letting us know in writing of the date cancellation is to take effect.'

b. We may cancel this policy only for the reasons stated below by letting you know- in- writing of the date cancellation takes effect. This cancellam notice may be delivered to you, or' mailed to you at your mailing address _shown in the Declarations.

Proof of mailing will be sufficient proof of notice.

(1) When you have not paid the -premium, we may cancel at any time by letting you knew at least 10 days before the date cancellation takes-effect.

(2) When this policy has been in effect for less than 60 days and, is. not a renewal with us, we may cancel for any reason by letting you

know at least 10 days before the date cancellation takes effect.

(3) When this policy has been in effect for 60 days or more, or at any time if it is a renewal with us, we may cancel:

(a) If there has been a material misrepresentation of fact which if known to us would have caused us not to issue the policy; or

(b) If the risk has changed substantially since the policy was issued.

This can be done by letting you know at least 30 days before the date cancellation takes effect.

(4) When this policy is written for a period of more than one year, we may cancel for any reason at anniversary by letting you know at least 30 days before the date cancellation takes effect.

c. When this policy is cancelled, the premium for the period from the date of cancellation I. the expiration date will be refunded pro rata.,

d. If the return premium is not refunded with the notice of cancellation or when this policy is returned to us, we will refund it within a reasonable time after the date cancellation takes effect.

6. Nonrenewable. We may elect not to renew this policy: We may do so by delivering to you, or mailing to you at your mailing address shown in the Declarations, written notice at least 30 days before the expiration date of this policy. Proof of mailing will be sufficient proof of-notice,

7. Assignment. Assignment of this policy will not be valid unless we give our written consent.

8. Subrogation- An "insured" may waive in writing before a loss alt rights of recovery against any person. If not waived, we may require an assignment of rights of recovery for a loss to the extent that payment is made by us.

   If an assignment is sought, an Insured" must sign and deliver all related papers and cooperate with. us.

   Subrogation does not apply under. Section II to Medical Payments to Others or Damage to Property of Others.

9. Death. If any person named in the Declarations or the spouse, if a resident of the same "household, dies:

   a. We insure the legal representative of the deceased but only with respect to the premises and property of the deceased covered under the policy at the time of death;

   b. 'Insured" includes:

      (1) Any member of your household who is an "insured" at the time of your death, but only while a resident of the "residence premises"; and

      (2) With respect to your properly, the person having proper temporary custody of the property until appointment and qualification of a legal representative.

HOMEOWNERS
HO 01 01 05 97

THIS ENDORSEMENT CHANGES THE. POLICY.
PLEASE READ IT CAREFULLY.

SPECIAL PROVISIONS ALABAMA

SECTION 1— PROPERTY COVERAGES

Throughout this policy, the following is added to any provision which uses the term actual cash value.

Actual cash value is calculated is the amount it would cost to repair, or replace covered property, at the time of loss or damage, with material of like kind and quality, subject to a deduction for deterioration, depreciation and obsolescence. Actual cash value applies 'to valuation of covered property regardless of whether that property has sustained partial or total loss or damage.

The actual cash value of the lost or damaged property may be significantly less than its replacement cost.

COVERAGE C — PERSONAL PROPERTY

SPECIAL LIMITS OF LIABILITY

Items 10. and 11 are deleted and replaced by- the following (These are Items 7. and 8. in Form HO 00 06):

10. $1,000 for lots to electronic apparatus, while in or upon a motor vehicle or other motorized land conveyance, if the electronic, apparatus is equipped to be operated by power from the electrical system of the vehicle or conveyance While retaining its, capability of being operated by other sources of power. Electronic apparatus includes:

    a. Accessories or antennae; .or

b. Tapes, wires, records, discs or other media; for user with any electronic, apparatus described 4n this item-10:

11. $1,000 for loss to eletronic apparatus, While not in or upon a motor vehicle or other motorized land conveyance, if the electronic apparatus:

a. is equipped to be operated by power from the electrical system of the vehicle or conveyance' while retaining its capability of being - operated by other sources of power;

b: Is away from the "residence premises"; and

c. Is used at any time or in any manner for any "business" purpose.

Electronic apparatus includes:

a. Accessories and antennas; Or

b. Tapes; wires, records, discs or other media;

for use with any electronic apparatus described this item 11.

PROPERTY NOT COVERED

Item 3.b. Is deleted and replaced by the following: Motor-vehicles other motorized and conveyances. This includes;

b. Electronic apparatus that Is designed to be operated 'solely by use cline power from the electrical system of motor vehicles or all other' motorized land conveyances. Electronic apparatus includes:

(1) Accessories or antennas: or

(2) Tapes; wires, records; discs or other media; for use with any electronic apparatus described in this Item 3.b.

The exclusion of property described in 3.a. and 3.b. above applies only while the property is in or upon the vehicle or conveyance.

We do cater vehicles or conveyances riot subject to motor vehicle registration which are:

a. Used to service an 'insured's" residence; or

b. Designed for assisting the handicapped;

COVERAGE D— LOSS OF USE

For all forms other than HO 00 04 and HO 00 06, 'Item"' 1, is deleted and replaced by the following:

1. If a loss covered under this Section makes that part of the "residence premises" where you reside. not fit to live in, we cover the Additional Living Expense, meaning any necessary Increase, in living expenses incurred by you so that your household can maintain its normal standardof living.

   Payment will-be for the shortest-time required to repair or replace toe damage, or, if you permanently relocate, the shortest time required for your household to settle elsewhere.

For Forms HO 00 04 and HO 00 06, Item 1. is deleted and replaced by the following:

1.. if a loss by a Peril Insured Against under this policy to covered property or the building containing the property makes .the "residence premises" not fit to live in, we cover the Additional Living Expense, meaning any necessary increase in living expenses incurred by you so that your household can maintain its normal standard of living.

Payment, will be for the shortest time required 10, repair or replace the damage, or, if you permanently relocate the shortest time required for your household to settle elsewhere.

ADDITIONAL COVERAGES

9. Glass or Safety Glazing Material is deleted and replaced by the following:

9. Glass Or Safety Glazing Material

a. We cover:

(1) For all forms other than HO 00 04 and HO 00 06, the breakage of Glass or Safety Glazing Material which is part of a covered building, storm door or storm Window, and for

(a) Form HO 00 04, the breakage of Glass or Safety Glazing Material which is part of a building, storm door or-storm window, and covered as Building Additions And Alterations; and

(b) Form HO 00 06, the breakage of Glass or Safety Glazing Material which is part 'of-a-building storm window, and covered under Coverage A; and

(2) For all forms other than HO 00 04 and HO 00 06, the breakage, caused directly by Earth Movement, of Glass or Salty Glaz-ing Material which Is part of a covered building, storm door or storm window, and for:

(a) Form HO 00 04; the breakage, caused directly by Earth Movement, of Glass or Safety Glazing Material which is part of it building, storm door or storm window,

and covered as Building Additions And Alterations; and

(b) Form HO 00 06, the breakage, caused directly by Earth Movement, of Glass or Safety Glazing Material which is part of a building, storm door or storm window, and covered under Coverage A; and

(3) The direct physical force to cowered property caused solely by the pieces, frag-ments, splinters of broken glass or Safety Glazing Material which is part of a build-ing, storm door or storm window.

b. This coverage does not include loss:

(1) To covered properly which results because the, Glass or Safety Glazing Material has been broken, except as provided in a.(3) above; or

(2) On the "residence premises" if the dwelling has been vacant for more then 30 consecutive days immediately before the loss. except when the breakage results directly from Earth Movement as provided for in a: (2) above. A dwelling being constructed is not considered vacant.

Loss to glass covered under this Additional Coverage 9. will be settled on the basis of replacement with safety, glazing materials when requited by ordinance or law.

For Forms HO 00 01 and HO 00 08, we will pay up to $100 for loss under this coverage.

This coverage does not increase the limit of liability that applies to the damaged property.

(This is Additional Coverage 8. in Forms HO 00 01 and HO 00 08.)

The following additional Coverage is forms except HO 00 08. With respect to Form HO 00 04, the .words "covered building" used below, refer to property covered under Additional Coverage 10. Building Additions And Alterations.

11. Ordinance or Law

a. You may use up to 10% of the limit of liability that applies to Coverage. A (or for Form HO 00 04, you may use up to 10% of the limit of liability that applies to Building Additions And Alterations) for the increased costs you incur due to the enforcement of any ordinance or law which requires or regulates:

(1) The construction, demolition, remodel-ing. renovation or repair of that parrot's covered building or other structure damaged by a Peril Insured Against;

(2) The demolition and reconstruction of the undamaged part of a covered building or other structure, when that building or other structure must be totally demolished because of damage by a Peril insured against to. another part of that covered building or other structure; or

(3) The remodeling, removal or replacement of the portion of the undamaged part of a covered building or other structure necessary to complete the remodeling, repair or replacement of that part of the covered building or other structure damaged' by a Peril insured Against.

b. You may use all or part of this ordinance or law coverage to pay for the increased costs you incur to remove debris resulting from the construction, demolition, remodeling, renovation, repair or replacement of property as slated in a. above.

c. We do not cover:

(1)The loss in value to any covered building or other structure due to the require-ments of any ordinance or law; or

(2)The costs to comply with any ordinance law which requires any "insured" or others to test for. monitor, clean up 'remove, contain, treat, detoxify or neutralize, or in any way respond le, or assess the effects of, pollutants on any covered building or other structure

Pollutants means any solid liquid, gaseous or thermal irritant or contaminant, including smoke, vapor„ soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

This coverage is additional insurance.

(This is Additional Coverage 10. in Forms HO 00 01 and HO 00 064

SECTION I - EXCLUSIONS

1. Ordinance or Law is deleted and replaced by the following

1. Ordinance Or Law, meaning any ordinance or law:

a. Requiring or regulating the construction, demolition, remodeling, renovation or repair of

property, including removal of any result-ing debris. This Exclusion 1.a. in all forms other than HO 00 03, 1.a.(1) in Form HO 00 03, does not apply to the amount of, coverage that may he provided for under Additional Coverage, Class or Safety Glazing Material or Ordinance or Law;

b. The requirement's of which result in a loss in value to property, or

c. Requiring any "insured" or others to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, pollutants.

Pollutants means any. solid, liquid, gaseous thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

This exclusion applies whether or not the Property has been Physically damaged.

(This is Exclusion 1.a. in Form HO 00 03.

2. Earth Movement is deleted and replaced by the following:

2. Earth Movement, meaning earthquake, includeing land shock waves -or tremors before, during or after a volcanic eruption; landslide; mine subsidence; mudflow; earth sinking, rising or shifting; unless direct loss by:

a. Fire; or

b. Explosion;

ensues and then we will pay only for the ensuing loss.

This exclusion does not apply to loss by theft.

(This is Exclusion 1.b. in Form HO 00 03.)

4. Power Failure. is deleted and replaced by the following:

4. Power Failure, meaning the failure of power or other utility service if the failure takes place off the 'residence premises" But if the failure of power or other utility service results In a loss, from a Peril Insured Against on the "residence premises", we will pay for the loss or damage caused by that Peril Insured Against,

(This is Exclusion 1.d. in Form HO 00 03,)

SECTION I CONDITIONS

3. Loss Settlement

Under Form HO 00 06, Item b.(2) is deleted end replaced by the following:,

(2) If the damage is not repaired or replaced within. a reasonable time, at actual cash value but 'not more than the amount required to repair or replace.

SECTION II- EXCLUSIONS

Under 1. Coverage E Personal Liability and Coverage F' Medical Payments 'To Others, Item a is deleted and replaced by the following:

a. Which is expected or intended by one or more. Insureds";

SECTIONS I AND II CONDITIONS

2. Concealment or Fraud is deleted and replaced by the following:

2. Concealment or Fraud-

a. Under Section I - Property Coverages, with respect to all "insureds" covered. under this policy, we provide no coverage for lose under Section I Property Coverages if, whether. been before or after a loss, one or more "insureds" have:

(1) intentionally concealed or misrepresented any material fact or circumstance:

(2) Engaged in fraudulent conduct: or

(3) Made false statements; relating to this insurance.

b. Under Section II—Liability coverages, we do not provide coverage to one or more "insureds" who, whether before or after a loss, have:

(1) Intentionally concealed or misrepresented any material fact or circumstanced;

(2) Engaged in fraudulent conduct; or

(3) Made false statements relating to this insurance.

All other provisions of this policy apply.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

SPECIAL COMPUTER COVERAGE
All Forms Except HO 00 03 with HO 00 15
And HO 00 06 with HO 17 31

THIS ENDORSEMENT: (1) DOES NOT INCREASE THE LIMIT OF LIABILITY WHICH APPLIES TO COVERAGE C, AND (2) DOES NOT MODIFY THE SPECIAL LIMITS OF LIABILITY OR THE PROVISIONS OF PROPERTY NOT COVERED UNDER COVERAGE C.

For an additional premium, the Perils Insured Against which apply to Coverage C are deleted arid replaced by the following with respect to "computer equipment":

Perils Insured Against We cover an "insured's" "computer equipment," as defined in this endorsement, against risk of direct physical loss.

We do not insure, however, for loss:

a. Excluded under SECTION 1 — EXCLUSIONS.

b. Caused by:

(1) Freezing of a plumbing, heating, air conditioning or automatic fire protective sprinkler system or of a household appliance, or by discharge, leakage or overflow from within the system or appliance caused by freezing, This exclusion applies only while the dwelling is vacant, unoccupied or being constructed, unless you have used reasonable care to:

(a) Maintain heat in the building; or

(b) Shut off the water supply and drain the system arid appliances of water;

(2) Theft in or to a dwelling under construction, until the dwelling is finished and occupied;

(3) Any of the following:

(a) Wear and tear, marring, deterioration;

(b) Inherent vice, latent defect, mechanical breakdown;

(c) Smog, rust or other corrosion, mold, wet or dry trot

(d) Smoke from agricultural smudging or industrial operations;

(e) Discharge, dispersal, seepage, migration, release or escape of pollutants unless the discharge, dispersal, seepage, migration, release or escape is itself caused by one or more of the Perils Insured Against that would apply under Coverage C of the policy form if this endorse merit were not attached to the policy form.

Pollutants means any solid, liquid, gaseous or thermal Irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed;

(f) Settling, shrinking, bulging or expansion, including resultant cracking, of pavements, patios, foundations, walls, floors, roofs or ceilings;

(g) Birds, vermin, rodents or insects; or

(h) animals owned or kept by an "insured". If any of these cause water damage not otherwise excluded, from a plumbing, heating, air conditioning or automatic fire protective sprinkler system or household appliance, we cover loss caused by the water.

Under items (1) through (3), any ensuing loss not excluded or excepted in this policy is covered.

(4) Vandalism and malicious mischief if the dwelling has been vacant for more than 30 consecutive days immediately before the loss. A dwelling being constructed is not considered vacant;

(5) Dampness of atmosphere or extremes of temperature unless the direct cause of loss is rain, snow, sleet or hail;

(6) Refinishing, renovating or repairing property;

(7) Collision, other than collision with a land vehicle, sinking, swamping or stranding of watercraft, including their trailers, furnishings, equipment and outboard engines or motors;

(8) Destruction, confiscation or seizure by order of any government or public authority; or

(9) Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body. However, any ensuing loss not excluded or excepted in this policy is covered.

DEFINITION

With respect to the coverage provided by this endorsement, "computer equipment' means:

1. Electronic data processing hardware and related peripheral equipment, including CRT screens, disc drives, printers and modems; and
2. Discs, tapes, wires, records or other software media used with the equipment in 1. above.

All other provisions of this policy apply.

HOMEOWNERS
HO 04 16 04 91

PREMISES ALARM OR FIRE PROTECTION SYSTEM

For a premium credit, we acknowledge the installation of an alarm system or automatic sprinkler system approved by us on .the "residence premises." You agree to maintain this system in working order and to let us know promptly of any change made to the system or if it is removed.

HOMEOWNERS
HO 04 90 04 91-

THIS ENDORSEMENT CHANGES THE POLICY
PLEASE READ IT CAREFULLY

PERSONAL PROPERTY REPLACEMENT COST

SECTION I

For an additional premium, covered losses to the following property are settled at replacement cost' at life tithe alas:

a. Coverage 9 — Personal Property;

b. If covered in this policy, awnings, carpeting, household appliances, outdoor antennas. and outdoor equipment. whether or not attached to buildings.

Personal Property Replacement Cost coverage will apply to following articles or classes of property if they are separately described and specifically insured in this policy:

a. Jewelry;

b. Furs and garments, trimmed with tut Or consisting principally of fur;

c. Cameras, projection machines, films and related articles of equipment;

d. Musical equipment and related 'articles of equipment;

e. Silverware,, silver-plated ware, goldware, gold-plated ware and pewterware, but excluding pens, pencils,. flasks, smoking Implements or jewelry; and

f. golfer's equipment meaning golf clubs, golf clothing and golf equipment.

Personal Property Replacement Cost coverage will not apply to other classes of property separately described and specifically insured.

1. PROPERTY NOT ELIGIBLE

Property listed below Is not eligible for replacement cost settlement. Any foss will -be settled at actual casts value at the -time of loss but not more than the amount required to repair or replace.

a. Antiques, fine arts, paintings and similar articles of rarity or antiquity which cannot be replaced.

b. Memorabilia; souvenirs, collectors items and similar articles whose age or -history contribute to their value.

c. Articles not- maintained in good--or-workable-a: condition.

d. Articles that are outdated or obsolete and are stored or not being used.

2. REPLACEMENT COST

The following loss settlement procedure applies to all property insured under this endorsement:

a. We will pay no more than the least of -the following amounts:

(1) Replacement cost at the time of loss without deduction for depreciation;

(2) The full cost of repair at the time of loss;

(3) The limit of liability that applies to Coverage C. if applicable;

(4) Any applicable. special limits of liability stated in this policy; or

(5) For loss to any item separately described and specifically insured in this policy the limit of liability that applies to the item.

b. When the replacement cost for the entire loss under this endorsement is more than $500, we will pay no more than the actual cash value for the leas or damage until the actual repair or replacement is complete.

c. You may make a claim for loss on an actual cash value basis and then make claim within 180 days after the loss for any additional liability in accordance with this endorsement.

All other provisions of this policy apply.

HOMEOWNERS
HO 04 96 04 91

NO SECTION II - LIABILITY COVERAGES FOR HOME DAY CARE BUSINESS LIMITED SECTION I - PROPERTY COVERAGES FOR HOME DAY CARE BUSINESS

If an "insured" regularly provides home day care services to a person or persons other than "insureds" and receives monetary or other compensation for such services, that enterprise is a "business." Mutual exchange of home day care services, however, is not considered. compensation. The rendering of home day care services by an Insured" to a relative of an "insured" is not considered a "business."

Therefore, with respect to a home day care enterprise which is considered to be a "business," this policy:

1. Does not provide Section II — Liability Coverages because a "business" of an "insured" is excluded under exclusion 1.b. of Section II — Exclusions;
2. Does not provide Section I — Coverage B coverage where other structures are used in whole or in part for "business";
3. Limits coverage for property used on the "residence premises" for the home day care enterprise to $2,500, because Coverage C Special Limits of Liability — item 8. imposes that limit on "business" property on the "residence premises.' (Item 8, corresponds to item 5. in Form HO 00 08.);
4. Limits coverage for property used away from the "residence premises" for the home day care enterprise to $250, because Coverage C Special Limits of Liability — item 9. Imposes that limit on "busi-

ness" property away from the "residence premises." Special Limit of Liability item 9. does not apply to adaptable electronic apparatus as described in Special Limit of Liability items 10. and 11. (Items 9. 10. and 11. correspond to items 6., 7 and 8. respectively in Form HO 00 08.)

THIS ENDORSEMENT DOES NOT CONSTITUTE A REDUCTION OF COVERAGE.

POLICY NUMBER: HOMEOWNERS
HO 05 80 05 97

THIS ENDORSEMENT CHANGES THE POLICY.
PLEASE READ IT CAREFULLY.

PROPERTY REMEDIATION FOR ESCAPED LIQUID FUEL AND LIMITED LEAD AND ESCAPED LIQUID FUEL LIABILITY COVERAGES ALL FORMS EXCEPT FORMS HO 00 04 AND HO 00 06

SCHEDULE

For the credit given or the premium charged, the coverage provided by this endorsement and the applicable Limits of Liability shown in this Schedule apply. These limits of liability apply to the total of all loss, damage or expense payable under this endorsement, regardless of the number of locations insured under this endorsement and listed in this Schedule.		
1.	Aggregate Limited Lead And Escaped Liquid Fuel Liability Limit Of Liability	$50,000
2.	Property Remediation For Escaped Liquid Fuel Limit Of Liability This Property Remediation For Escaped Liquid Fuel Limit Of Liability applies to the "residence premises" as defined in Paragraphs a., b. or c. of Definition 8. "Residence premises" In this endorsement and any of the following locations as defined in Paragraph d. of Definition 8. "Residence premises":	$10,000

* Entries may be left blank if shown elsewhere in this policy for this coverage.

A. Definitions

The definitions applying to the policy form, other than Definition 8. "Residence premises", apply to this endorsement. Definition 8. 'Residence premises" is amended and Definitions 9. through 11. are added only with respect to the coverage provided by this endorsement.

8. "Residence premises" means:

   a. The one family dwelling, other structures, and grounds where you reside;

   b. That part of any other building where you reside; or

   c. A two family dwelling where you reside in at least one of the family units;

and which is shown as the "residence premises" in the Declarations; and

   d. Any location shown in the Schedule of this endorsement.

9. "Covered real property'. The following applies only to the Section I — Additional Coverage — Property Remediation For Escaped Liquid Fuel:

   a. "Covered real property" means:

      (1) Property owned by an Insured" and covered under Coverage A — Dwelling of this policy;

      (2) Any other one, two, three or four family dwelling building owned by an "insured"

and shown in the Schedule under item 2.;

(3) Materials and supplies located on or next to the "residence premises", used to construct, alter or repair the dwelling or other structures on the "residence premises";

(4) Property owned by an "insured" and covered under Coverage B — Other Structures of this policy, provided such property is located on the "residence premises"; and

(5) Land, other than farm land:

(a) Which is within the "residence premises";

(b) Which is owned by an Insured"; and

(c) On which a building or structures described in Paragraphs 9.a.(1), (2), (3) or (4) is located.

b. "Covered real property" does not include:

(1) Water;

(2) Other structures that are part of the "fuel system"; or

(3) Trees, shrubs, plants or lawns, except to the extent permitted by Paragraph 8.3.c. of this endorsement.

10. "Covered personal property". The following applies only to the Section 1 — Additional Coverage — Property Remediation For Escaped Liquid Fuel:

a. "Covered personal property" means personal property:

(1) Owned or used by an "insured" and covered under Coverage C Personal Property of this policy, and

(2) Located on the "residence premises",

b. Loss or damage to such property shall be subject to those Coverage C Special Limits of Liability that apply.

11. "Fuel System" means:

a. One or more containers, tanks or vessels which have a total combined storage capacity of 100 or more U.S. gallons of liquid fuel; and:

(1) Are, or were, used to hold liquid fuel that is intended to be used solely for one or more of the following:

(a) To heat or cool a building;

(b) To heat water;

(c) To cook food; or

(d) To power motor vehicles, other motorized land conveyances or watercraft owned by an Insured" and not used at any time or in any manner for "business"; and

(2) Are, or were, located on:

(a) "Covered real property"; or

(b) An "insured location";

(c) Any pumping apparatus, which includes the motor, gauge, nozzle, hose

or pipes that are, or were, connected to one or more containers, tanks or vessels described in Paragraph 11.a.;

c. Filler pipes and flues connected to one or more containers, tanks or vessels described in Paragraph 11.a.;

d. A boiler, furnace or a water heater, the liquid fuel for which Is stored in a container, tank or vessel described in Paragraph 11.a., and which is located on:

(1) "Covered real property"; or

(2) An insured location";

e. Fittings and pipes connecting the boiler, furnace or water heater to one or more containers, tanks or vessels described in Paragraph 11.a.; or

f. A structure that is specifically designed and built to hold the liquid fuel that escapes from one or more contairiers, tanks or vessels described in Paragraph 11.a.

B. Section 1— Additional Coverages

The following Additional Coverage Is added:

PROPERTY REMEDIATION FOR ESCAPED LIQUID FUEL

1. With respect to the total of all escapes of liquid fuel from a "fuel system" which an "insured" first discovers or learns of during the policy period, we will pay up to the Limit of Liability shown in the Schedule for loss, damage or expense described in Paragraph B.3.

2. The Limit shown in the Schedule for this coverage is the most we will pay for the total of all loss, damage or expense payable under Paragraph B.3. regardless of the:

   a. Number of locations insured under this endorsement;

   b. Number of escapes of liquid fuel from a "fuel system" an Insured" first discovers or learns of during the policy period; or

   c. Number of claims made.

3. Loss, Damage Or Expense Covered This Coverage pays for:

   a. Loss or damage to:

      1. "Covered real property"; or

      2. Covered personal property;

      caused directly or indirectly by the escape of such fuel from a "fuel system";

   b. The reasonable expense you incur to:

      (1) Take temporary measures to stop the further escape of liquid fuel from any part of the "fuel system";

      (2) Retard or stop the spread of escaped liquid fuel;

      (3) Clean up, remove or treat loss or damage to:

         (a) "Covered real property"; or

         (b) "Covered personal property"; or

      (4) Test, monitor or assess the effects of the escape of liquid fuel on or away from "covered real property":

(a) As required by law; or

(b) In response to a request, demand or order by a governmental authority or court of law.

We will pay for such expense only if it results from the same escape that is payable under Paragraph 8.3.a., or b.;

c. Loss or damage to trees, shrubs, plants or fawns, located on the "residence premises", but only if there is loss, damage or expense caused by the same escape that is payable under Paragraph 8.3.a. or b. However, we will not pay more than an amount equal to 5% of the Limit of Liability shown in the Schedule for the total of all loss or damage to trees, shrubs, plants or lawns. No more than $500 of this amount will be payable for any lawn or any one tree, shrub, or plant We do not cover property grown for "business'.

Under Form HO 00 08, no more than $250 of the amount of insurance available under this coverage will be payable for lawns or any one tree, shrub or plant; and

d. Additional Living Expense

(1) Additional Living Expense means any necessary increase in living expenses you incur, so that your household can maintain its normal standard of living, if the escape of liquid fuel:

(a) Results in loss, damage or expense payable under Paragraph B.3.a. or b.; and

(b) Makes that part of the "residence premises" where you reside not fit to live in.

(2) Payment for Additional Living Expense will be for the shortest time required:

(a) To make that part of the "residence premises" where you reside fit to live in; or

(b) For your household to settle elsewhere, if you permanently relocate.

This period of time applies even if it extends past the expiration date of this policy.

We do not cover loss or expense due to cancellation of a lease or agreement.

(3) This coverage does not increase the Limit of Liability shown in the Schedule.

(4) Section I — Property Coverages, Coverage D — Loss Of Use in the policy form does not apply to this endorsement.

4. Deductible

The deductible amount, equal to that which applies to the peril of Fire, applies to loss, damage or expense covered under this additional coverage. We will pay only that part of the total of all loss, damage or expense payable under Paragraph 8.3. that exceeds that deductible amount.

5. Loss, Damage Or Expense Not Covered We will not pay:

a. For any diminution or reduction in the market value of any:

(1) "Covered real property"; or

(2) "Covered personal property";

b. For any damage resulting from the loss of or reduction in value of a pending sale of:

(1) "Covered real property"; or

(2) "Covered personal property";

c. To replace any fuel;

d. For any expense to:

(1) Demolish or remove; or

(2) Repair, replace, rebuild or restore;

any part of a "fuel system", other than those expenses provided for in Paragraph B.3.a. or b.; or

e. For any damage that results from an escape from:

(1) One or more containers, tanks or vessels, that are, or were, used to hold liquid fuel and are a part of a motor vehicle, motorized land conveyance or watercraft; or

(2) Related lines or parts, that are, or were, connected to a motor vehicle, motorized land conveyance or watercraft.

6. For Form HO 00 03, under Section 1— Perils Insured Against, Paragraph 2.e.(5) does not apply to this Property Remediation For Escaped Liquid Fuel Coverage.

7. When Special Computer Coverage Endorsement is attached, Paragraph B.(3)(e) in that endorsement, under Perils insured Against, does not apply to this Property Remediation For Escaped Liquid Fuel Coverage.

8. For Form HO 00 03 when the Special Personal Property Coverage Endorsement is attached, Paragraph 1.b.(4)(e) in that endorsement, does not apply to this Property Remediation For Escaped Liquid Fuel Coverage.

9. The Section I — Exclusions and Section 1 — Additional Coverages apply to this Property Remediation For Escaped Liquid Fuel Coverage.

10. The Section 1— Conditions apply to this Property Remediation For Escaped Liquid Fuel Coverage except as provided in Paragraph C. Section I — Conditions below.

11. This Property Remediation For Escaped Liquid Fuel Coverage does not apply to any "residence premises" at which the containers, tanks or vessels, described in Paragraph A.11.a., have a total combined storage capacity of less than 100 U.S. gallons of liquid fuel.

    Coverage, if any, for escape of liquid fuel from such containers, tanks or vessels is subject to those;

    a. Exclusions:

    b. Conditions;

    c. Other provisions; and

    d. Limits of Liability;

that apply to real and personal property under the policy to which this endorsement is attached.

C. Section 1 — Conditions — Property Remediation For Escaped Fuel

With respect to loss, damage or expense described in Paragraph B. Section I — Additional Coverages, Section 1 Condition 7. Other Insurance, is deleted and replaced by the following:

7. Other Insurance And Service Agreement

a. Other Insurance

If loss, damage or expense covered in preceding Paragraph B. is also covered by other insurance, we will pay only the proportion of the foss, damage or expense that the limit of liability that applies under this endorsement bears to the total amount of insurance covering the loss, damage or expense.

b. Service Agreement

If loss, damage or expense covered in preceding Paragraph B. is also covered by a service agreement, then this Property Remediation for Escaped Liquid Fuel Coverage is excess over any amounts payable under any such agreement. Service Agreement means a "fuel system" service plan, property restoration protection plan, or similar service or warranty agreement, even if it is characterized as insurance.

D. Section II — Liability Coverages

LIMITED LEAD AND ESCAPED LIQUID FUEL LIABILITY COVERAGE

1. With respect to "bodily injury" or "property damage" described In Paragraph D.2,, the coverages provided by Section 0 — Liability Coverages, Coverage E — Personal Liability and Coverage F — Medical Payments To Others in the policy form, and the Limits of Liability stated on the Declarations page do not apply.

2. This coverage applies if a claim is made or a suit is brought against an "insured" for damages because of:

   a. "Bodily injury' or "property damage" caused by an "occurrence" involving the escape of fuel from a "fuel system". However, this limited coverage does not apply to an "occurrence" of fire or explosion that results from such escaped fuel. Damages resulting from such an "occurrence" of fire or explosion are subject to the Coverage E — Personal Liability limit of liability of the policy to which this endorsement is attached;

   b. "Bodily injury" caused by an *occurrence" involving the absorption, ingestion or inhalation of lead which is in or on an Insured location"; or

   c. "Property damage" caused by an "occurrence" of lead contamination, but only if, immediately prior to the 'occurrence", the lead was located at an Insured location".

   NO OTHER LEAD OR ESCAPED LIQUID FUEL LIABILITY COVERAGE APPLIES

UNDER THIS POLICY EXCEPT AS PROVIDED IN THIS PARAGRAPH.

3. If coverage applies as stated in Paragraph D.2., we will:

   a. Pay up to the Aggregate Limit of Liability stated in the Schedule for damages for which an insured" is legally liable. Damages include prejudgment Interest awarded against en "insured"; and

   b. Provide a defense at our expense by counsel of our choice even if the suit is groundless, false or fraudulent. We may investigate and settle any claim or stilt that we decide is appropriate. Our duty to settle or defend ends when the amount we pay for damages resulting from "bodily injury" or "property damage" described in Paragraph D.2. exhausts the Aggregate Limit of Liability stated in the Schedule.

4. With respect only to applying the provisions of this coverage as described in Paragraph 1)2., "bodily injury" or "property damage" caused in whole or in part by an "occurrence" described in Paragraph D.2. shall be deemed to have been caused solely by such an "occurrence" regardless of any other covered cause or event contributing to the "bodily injury" or "property damage".

5. The Section II — Additional Coverages in the policy form apply with respect to this coverage as described in Paragraph D. except as provided in Paragraph E. Section II — Additional Coverages.

6. The Section 11— Conditions in the policy form apply with respect to this coverage as described in Paragraph D. except as provided in Paragraph F. Section 1I — Liability Conditions.

7. This coverage does not apply to an "insured location" at which the containers, tanks or vessels described in Paragraph Alta. have a total combined storage capacity of less than 100 U.S. gallons of liquid fuel.

   Coverage, if any, for an "occurrence" involving the escape of liquid fuel from such containers, tanks or vessels is subject to those:

   a. Exclusions;

   b. Conditions;

   c. Other provisions; and

   d. Limits of Liability;

   that apply to Personal Liability and Medical Payments To Others coverage in the policy to which this endorsement is attached.

E. Section II — Additional Coverages

With respect to coverage described in Paragraph D. Section II — liability Coverages, Additional Coverage 4. Loss Assessment is deleted and replaced by the following:

4. Loss Assessment

a. We will pay up to the Aggregate Limit of Liability stated in the Schedule for your share of loss assessment charged during the policy period against you by a corporation or association

of property owners, when the assessment is made as a result of:

(1) An "occurrence" involving the escape of fuel from a "fuel system";

(2) Sections I and II Conditions, Item 1. Policy Period in this endorsement and in the policy form to which this endorsement is attached.

F. Section 11- Liability Conditions

With respect to coverage described in Paragraph D. Section U- Liability Coverages:

1. Conditions 4. - Duties Of An injured Person Coverage F Medical Payments To Others and 5. - Payment Of Claim - Coverage F -Medical Payments To Others are deleted; and

2. Conditions 1. - Limit Of Liability and 2. - Severability Of insurance in the policy form are deleted and replaced by the following:

1. Aggregate Limit of Liability

Our total liability in any one policy period for all damages resulting from the total of all "bodily injury" or "property damage" during the policy period will not be more than the Limited Lead and Escaped Liquid Fuel Liability Coverage Aggregate Limit of Liability stated in the Schedule. This is the most we will pay regardless of the:

a. Number of locations insured under the policy to which this endorsement is attached;

b. Number of persons injured;

c. Number of persons whose property is damaged;

d. Number of "insureds"; or e. Number of claims made.

The "occurrence" limit of liability does not apply to this coverage.

2. Severability Of Insurance

This insurance applies separately to each "insured" except with respect to the Aggregate Limit of Liability described in Paragraph F.2.1. This condition will not increase the Limit for this coverage.

G. Sections I and II - Conditions

Sections I and II - Conditions, item 1. Policy Period is deleted with respect to the provisions of this endorsement and replaced by the following:

1. Policy Period - Section II - Liability

This endorsement applies to "bodily injury" or "property damage" described in Paragraph D.2.

All other provisions of the policy not specifically modified by this endorsement apply.

LEXINGTON INSURANCE COMPANY
STANDARD POLICY CONDITIONS

THIS ENDORSEMENT CHANGES THE POLICY
PLEASE READ IT CAREFULLY

MINIMUM EARNED PREMIUM CLAUSE

In the event of cancellation of this policy by you, the minimum premium listed on the Declaration page shall become fully earned, any provision of the policy to the contrary notwithstanding.

Your failure to make timely payment of premium shall be considered a request by you for us to cancel on your behalf In the event of such cancellation for non-payment of premium, the minimum. earned premium shall be due and payable; provided, however, such cancellation shall be rescinded if you remit and we receive the full policy premium within 10 days after the date of issuance of the cancellation notice. Such remittance and acceptance by us shall not affect the minimum earned provision of this endorsement. In the event of any other cancellation by us, the earned premium shall be computed pro-rata, not subject to the minimum earned premium.

SERVICE OF SUIT CLAUSE

Service of Suit - In the event of our failure to pay any amount clammed to be due hereunder, we, at your request, will submit to the jurisdiction of a court of competent jurisdiction within the United States. Nothing in this condition constitutes or should be understood to constitute a waiver of our rights to commence an action in any court of competent jurisdiction in the United States to remove an action to a United States District Court or to seek a transfer of a case to another court as permitted by the laws of the United States or of any state in the United States, It is further agreed that service of process in such suit may be made upon Counsel, Legal Department, Lexington Insurance Company, 200 State Street, Boston, Massachusetts, 02109 or his or her representative, and that in any suit instituted against us upon this policy, we will abide by the final decision of such court or of any appellate court in the event of an appeal.

Further, pursuant to any statute of any state, territory, or district of the United States which makes

provision therefor, we hereby designate the Superintendent, Commissioner or Director of Insurance, or other officer specified for that purpose in the statute, or his or her successors in office as our true and lawful attorney upon whom may be served any lawful process in any action, suit, or proceeding instituted by you or on your behalf or any beneficiary hereunder arising out of this policy of insurance and hereby designate the above named Counsel as the person to whom the said officer is authorized to mail such process or a true copy thereof.

AUTHORIZATION CLAUSE

IN WITNESS WHEREOF, we have caused this policy to be executed and attested, but this policy shall not be valid unless signed on the Declaration page by our duly authorized representative.

/s/ Elizabeth M. Tuck
SECRETARY

/s/ Illegible
CHAIRMAN AND CEO

[Logo]

IMPORTANT FLOOD INSURANCE NOTICE

Your homeowners or dwelling policy does NOT provide coverage for loss caused by flood or mudslide, which is defined, in part, by the National Flood Insurance Program as:

A general and temporary condition of partial or complete inundation of normally dry land areas from overflow of inland or tidal waters or from the unusual and rapid accumulation or runoff of surface waters from any source.

If you are required by your mortgage lender to have flood insurance on your property, or if you feel that your property is susceptible to flood damage, insurance covering damage from flood is available on most buildings and contents in participating communities through the National Flood Insurance Program.

Information about flood insurance and whether your community participates in the program can be obtained from your insurance company from your insurance agent/broker, or directly from the National Flood Insurance Program by calling 1-800-638-6620.

If you purchase the maximum limits available through the National Flood Insurance Program, and require additional limits, contact your agent/broker for information regarding the Lexington Insurance Company's Excess Flood Program.

THIS ENDORSEMENT CHANGES THE POLICY PLEASE READ IT CAREFULLY.

EXTERIOR INSULATION AND FINISH SYSTEM EXCLUSION

THIS ENDORSEMENT IS ADDED TO YOUR HOMEOWNERS POLICY AND APPLIES TO ALL COVERAGES AND COVERAGE PARTS THAT FORM PART OF THIS POLICY.

This coverage does not apply to any of the following, regardless of any other cause or event that contributes thereto, concurrently or in any sequence:

1. "Bodily injury", "property damage", or any other loss including but not limited to seepage, &lamination, detachment, cracking, insect damage, collapse or imminent collapse, caused directly or indirectly, in whole or in part, by the design, manufacture, construction, fabrication, preparation, installation, application, maintenance or repair, including remodeling, service, correction, or replacement, of an "exterior insulation and finish system" or any part thereof, or any -substantially similar system or any part thereof, including the application or use of conditioners, primers, accessories, flashings, coatings, caulking or sealant in connection with such a system; or

2. Any moisture-related or dry rot-related. "property damage" to an "inured location" or other building to which an "exterior insulation and finish system" has been applied, if that "property damage" is caused directly or indirectly, in whole or in part, by the "exterior insulation and finish system";

For the purpose of this endorsement, an "exterior insulation and finish system" means an exterior

cladding or finish system applied to an "insured location" or other building, and consisting of:

a) A rigid or semi-rigid insulation board made of expanded polystyrene or other material; and

b) The adhesive and/or mechanical fasteners used to attach the insulation board to the substrate; and

c) A reinforcing mesh that is embedded in a base coat applied to the insulation board; and

d) A finish coat providing surface texture and Color.

However, an "exterior insulation and finish system" does not include a cement-based, enhanced stucco cladding system which;

a) Incorporates a weather resistive building wrap; and

b) Incorporates ribbed insulation board to provide drainage.

Nothing in this exclusion is deemed to supersede coverage provided by the Limited Mold Coverage Related endorsement (LEX 04 33 04 02); (LEX 00 25 11 01); (LEXELITE 00 25 02 03); (LEXELITE 00 25 04 02); (LEX DP 04 33 05 03).

All other terms, conditions and exclusions of the policy remain unchanged.

[Logo]

HOMEOWNERS
LEX 01 09 03 G3

THIS ENDORSEMENT CHANGES THE POLICY.
PLEASE READ IT CAREFULLY

SPECIAL PROVISIONS

SECTION 1-- PROPERTY COVERAGES

COVERAGE B —Other Structures. The last paragraph is deleted and replaced by the following:

The limit of liability for this coverage shall not exceed the amount shown in the Declarations.

DEDUCTIBLE CLAUSE — is added as follows:

Unless otherwise noted in this policy, the following deductible provision applies:

Subject to the policy limits that apply, we will pay only that part of the total of all losses payable under Section I Property Coverages that exceed the applicable deductible amount shown in the Declarations, under no circumstance shall the applicable deductible be Tess than the All Other Peril (AOP) deductible listed on the Declarations.

SECTION I ADDITIONAL COVERAGES

11. Ordinance or Law is deleted and replaced on Homeowners 4 — Contents Broad Form (HO 00 04 04 91) or Homeowners 8— Unit-Owners Form (HO 00 06 04 91) as follows:

11. Ordinance or Law does not apply and no coverage is provided.

SECTION I PERILS INSURED AGAINST

COVERAGE A — DWELLING and COVERAGE B — OTHER STRUCTURES

2.a. is deleted and replaced by. the following:

a. Freezing of a plumbing, heating, air conditioning or automatic fire protective sprinkler system or of a household appliance, or by discharge, leakage or overflow from within the system or appliance caused by freezing. This provision does not apply if you have used reasonable care to:

(1) Maintain heat In the building; or

(2) Shutoff the water supply and drain all systems and appliances of water,

However, if the building is protected by, an automatic fire protective sprinkler system, you must use reasonable care to continue the water supply and maintain heat in the building for coverage to apply.

SECTION 1— EXCLUSIONS

Paragraph 1.i. Act of Terrorism. is added;

i. Act of Terrorism. meaning an act, including but not limited to the use of force or violence and/or the threat thereof, of any person or group(s)-of persons, whether acting alone or on behalf of or in connection with any organization(s) or government(s), committed for political, religious, ideological or similar purposes including the Intention to influence any government and/or to put the public, or any section of the public, in fear.

It is hereby understood and agreed, that notwithstanding any provision to the contrary, it is agreed that this policy. excludes, damage, cost or expense of whatsoever nature directly or indirectly caused by, resulting from or in connection with biological, chemical, or nuclear pollution or contamination arising out of any act of terrorism regardless of any other cause or event contributing concurrently or in any other sequence to the loss.

The policy else excludes damage, cost or expense o whatsoever nature directly or indirectly caused by, resulting from or in connection with any action taken in controlling, preventing, or suppressing or in any way relating to any biological, chemical, or nuclear pollution or contamination arising out of an act of terrorism.

Nothing in this exclusion shall be construed to exclude loss, damage or cost or expense of whatsoever nature arising out of fire following any nuclear incident.

SECTION I - CONDITIONS

3.b. Loss Settlement- the following is added:

(6) if, at the time of loss, the building(s) under Coverage A or B are being repaired, renovated, rebuilt or under construction, the amount of insurance be the proportion of the value of the building that the actual cash value of the building, on that date, bears to the value when completed. You and we agree that, for insurance purposes only, the value-of the building is the amount shown on the Declarations.

SECTION II -EXCLUSIONS

Coverage E — Personal Liability and Coverage F Medical Payments To Others

Paragraph 1.a is deleted and replaced by the following

a. Which is expected or which may reasonably, be from the intentional acts or omissions or criminal acts or omissions of one or more "insured" persons. This exclusion applies even if the resulting "bodily injury" or "property damage"

(1) is committed by an "insured" person(s) lacking the mental capacity to govern their own conduct;

(2) Is of a different kind, quality or degree than initially expected or intended;

(3) Is sustained by, a different person, entity, real or personal property, than initially expected or intended.

This provision applies regardless of an insured" person(s) actually being charged with, or convicted of a crime.

Paragraph 1.j. is deleted and replaced by the following:

j. Which arises out of the transmission of a communicable disease by one or more "insured"person(s) or by any other person for whom the "insured" is legally responsible. In addition, 'We' shall have no duty to defend any claim or stilt seeking "bodily injury' or "properly damage"

Paragraph 1.m. is added:

m. Arising out of any claim of or indemnification for punitive or exemplary damages. We shall not have an obligation to pay for any costs, interests or damages attributable to punitive or exemplary dam ages.

SECTION I and II — CONDITIONS

2. Concealment or Fraud's deleted and replaced b the following:

2. We do not provide any coverage to one or more "insureds" who, whether before or after a loss has:

(1) Intentionally concealed or misrepresented real material fact or circumstance;

(2) Engaged in fraudulent conduct; or

(3) Made false statements

relating to coverage, we at our option may choose to void the entire policy.

..*

5. Cancellation and 6. the following is added:

Regardless of another special provision and or clauses to the contrary, these two sections are not modified by any other forms or endorsements attached to this policy. This policy is subject to the contract terms specified in Section 1 and II-Conditions, 5. Cancellation and 6. Nonrenewal. of the standard unendorsed Homeowners Form, unless prohibited by applicable slate law.

If any provision of this endorsement is expressly prohibited by applicable state law or applicable insurance department regulation, that provision does not, apply.

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THIS ENDORSEMENT CHANGES THE POLICY
PLEASE READ IT CAREFULLY.

WINDSTORM OR HAIL PERCENTAGE DEDUCTIBLE ALL FORMS EXCEPT
H0 00 04 and H0 00 06

For the premium charged, we will pay only that part of the total of the loss for all Section 1 Property Coverages that exceeds the windstorm or hail percentage deductible stated in this endorsement. This deductible applies in the event of direct physical loss to property covered under this policy caused directly or indirectly by windstorm or hail Such deductible applies regardless of any other cause or event contributing concurrently or in any sequence to the loss. No other deductible provision in the policy applies to direct physical loss caused by windstorm or hail.

In determining the amount, if any, that we wilt pay for loss or damage, we will deduct an amount equal to ___%* of the limit of liability that applies to Coverage A — Dwelling, in the policy to which this endorsement is attached, subject to a minimum $1,000 windstorm or hail deductible.

*Entries may be left blank if shown elsewhere in this policy for this coverage. All other provisions of this policy apply.

All other provisions of this policy apply.

[Logo]

HOMEOWNERS PROPERTY REMEDIATION FOR ESCAPED LIQUID FUEL AND LIMITED LEAD AND ESCAPED LIQUID FUEL LIABILITY COVERAGES

ADVISORY NOTICE TO POLICYHOLDERS

This notice does not provide coverage nor does this notice replace any provisions of your policy you should read your policy and review your declarations page for complete information on the coverages you are provided with. If there is any conflict between the policy and this notice, the provisions of the policy shall prevail.

The policy you have just applied for or received has:

added coverage for damage to your property caused by the escape of certain petroleum products that may be found in or on your home, your residential unit in an apartment, condominium or cooperative building, your household or personal property, other real property you own that is covered in this policy and land on which your home or unit or covered personal property is located; and

reduced liability coverage for injury to another person, or damage to the property of others, that is caused by the escape of certain petroleum products or by lead on or emanating from an insured location such as your house, any other premises where you are living but which you do not own, or vacant land that you own.

ESCAPED FUEL REMEDIATION

If liquid fuel escapes flora a fuel storage system on your property, kiss or damage caused by the escaped

fuel to your home, personal property, any other one, two, three or four family dwelling building you own and insure for remediation coverage will be covered. Additionally, your land on which the house, other structures or other dwelling building you own are situated will be covered for loss or damage. Coverage will apply when the fuel storage tanks, vessels and/or containers on your property have a total combined storage capacity of 100 or more U.S. gallons of liquid fuel. Coverage will also be provided for:

1. The cost of making temporary repairs to stop the further escape of liquid fuel, or to retard or stop the spread of escaped liquid fuel.
2. Reasonable expenses to test, monitor or assess the effects of escaped liquid fuel required by law, or when a governmental agency or a court of law requests, orders or demands that you do so.
3. Loss or damage to your trees, shrubs and plants that are not grown for business; and
4. Additional living expenses you incur to maintain your normal standard of living.

However, there will be no coverage:

1. For a reduction in the market value of your house and any other dwelling building you own, including the land on which they are situated, or your personal property, whether or not such property has been damaged;
2. For damages resulting from the loss of a pending sale of your house and, if covered under this policy, other dwelling buildings, other structures and your personal property;
3. To replace any of the escaped fuel;

4. For any expense you incur to demolish, repair or replace any part of your fuel system; and

5. For any damages resulting from an escape of liquid fuel from one or more containers, tanks or vessels or related lines or parts that are connected to or a part of a motor vehicle, motorized land conveyance or watercraft.

Our limit of liability

We will provide up to $10,000 of coverage. The limit is the most we will pay for the total of all loss, damage or expense caused by the eecape of liquid fuel from your fuel system during the policy period regardless of the number of locations insured under your policy, the number of escapes of liquid fuel you discover or team of during the policy period or the number of claims made.

Your Deductible

We will apply the AOP (all other perils) deductible shown on the declaration page to any loss.

LEAD AND ESCAPED FUEL LIABILITY COVERAGE

1. We have limited your coverage when a claim is made or a suit is brought against you by another person alleging damages because of:

   a. bodily injury arising out of the absorption, ingestion or inhalation of lead that is in or on your home or your residential unit, any other structures you may own, your personal property, and soil on any insured location;

b. property damage arising out of lead contamination, but only if the lead originates at an insured location; or

c. bodily injury or property damage arising out of the escape of liquid fuel from your fuel storage system when the fuel storage tanks, vessels and/or containers have a total combined storage capacity of 100 or more U.S. gallons of liquid fuel and the fuel is used to heat or cool your dwelling, heat water, cook food, or power your motor vehicle, recreational vehicle or boat not used in any business.

2. The limit of liability is provided on an aggregate basis. This means that the limit for liability coverage is the most we will pay for all damages resulting from the total of all bodily injury or property damage, occurring during the entire policy period, that is caused by the escape of liquid fuel from your fuel system or the exposure to lead. This aggregate limit is the most we will pay regardless of the number of locations insured under the policy, number of insureds, number of persons injured by the lead or escaped fuel, number of persons whose property is damaged by the lead or escaped fuel or the number of claims made against you.

We will provide up to $50,000 of coverage.

LEX 15 31 08 01

THIS ENDORSEMENT CHANGES THE POLICY
PLEASE READ IT CAREFULLY

SPECIAL PERSONAL PROPERTY COVERAGE

AGREEMENT

We agree to provide the special personal property coverage in this endorsement with the understanding that:

1. You occupy the 'residence premises" which contains the covered property; and
2. Such residence is not rented or sublet to another, without our prior knowledge and acceptance.

The Perils insured Against under homeowners form:

HO 00 03 Coverages A, B and C or,

HO 00 04 and HO 00 06 Coverage C only are deleted and replaced by the following:

SECTION 1— PROPERTY COVERAGES

A. Coverage C — Personal Property

The Special Limits of Liability, items 5., 6,. and 7., are deleted replaced by the following

5. $1,000 for foss by theft, misplacing or losing of jewelry, watches, furs, precious and semiprecious stones.
6. $2,000 for loss by theft, misplacing or losing of firearms.
7. $2,500 for loss by theft, misplacing or losing of silverware, silver-plated ware goldware, gold-plated ware; platinumware and platinum-platedware and pewterware, This includes flatware, hollowware, tea sets: trays and tro-

phies. made of or including silver, gold or pewter.

B. ADDITIONAL COVERAGES

8. Collapse

Paragraph a: is deleted and replaced by the following:

a. Perils Insured Against in Coverages A and B.

The following paragraph is also added:

This additional coverage does not apply to Coverage C Personal Property.

SECTION 1 — PERILS INSURED AGAINST

We Insure against risk of direct physical loss to property described in Coverages A, B and C for form HO 00 03 and for Coverage C only for form HO 00 04 and HO 0005.

We do not insure, however, for loss:

1. Under Coverages C:

a. Excluded under SECTION 1— EXCLUSIONS;

b. Caused by:

(1) Freezing of a plumbing, heating, air conditioning or automatic fire protective sprinkler system or of a household appliance, or by discharge, leakage or overflow from within the system or appliance caused by freezing. This provision does not apply if you have used reasonable care to:

(a) Maintain heat in the building; or

(b) Shut off the water supply and drain all systems and appliances of water

However, if the building is protected by an automatic tire protective sprinkler system, you must use reasonable care to continue the water supply or maintain heat in the building for coverage to apply.

For purposes of this provision a plumbing system or household appliance does not include a sump, sump pump or related equipment' or a roof drain, gutter, down spout or similar fixtures or equipment.

(2) Freezing, thawing, pressure or weight of water or ice, whether driven by wind or not, to a;

(a) Fence, pavement, patio or swimming

(b) Footing, foundation, bulkhead, wall, or any other structure or device, that supports all cued of a building or other structure;

(c) Retaining wall or bulkhead that does not support all. or part of a building_ or other structures; or

(d) Pier, wharf or dock;

(3) Theft in or to a dwelling under construction, or of materials and supplies for use in the construction until the dwelling is finished and occupied;

(4) Mold, fungus or wet rot. However, we do Insure for loss caused by mold, fungus or wet rot that is hidden within the walls or ceilings or beneath the floors or

above the ceilings of a structure if such loss results from the accidental discharge or overflow of water or steam from within:

(a) A plumbing heating, air conditioning or automatic fire protective sprinkler system, or a household appliance, on the " residence premises"- or

(b) A storm drain, or water, steam or sewer pipes, off the "residence premises"

For the purpose of this provision, a. plumbing system or household appliance does not include a sump, sump pump or related equipment or a roof drain. gutter, downspout or similar fixtures or equip-merit;

(5) Any of the following:

(a) Wear and tear, marring, deterioration

(b) Mechanical breakdown, latent defect, inherent vice, or any in property that causes it to damage or destroy itself;

(c) Smog, rust or other corrosion, mold, wet or dry rot;

(d) Smoke from agricultural smudging or industrial operations;

(e) Discharge, dispersal, seepage, migration, release or escape of pollutants unless the ,discharge, dispersal, seepage, migration, release or escape is itself caused by one or more of the

Perils Insured Against that would apply under Coverage C of the policy form if this endorsement were not attached to the policy form.

Pollutants means any solid. liquid, gaseous or thermal Irritant or contaminant Including smoke, vapor, soot, fumes, acids; alkalis, chemicals and waste. Waste includes materials to be recycled. reconditioned or ,reclaimed;

(f) Settling, shrinking, bulging or expansion, including resultant cracking, of pavements, patios, foundations, walls, floors, roofs or ceilings;

(g) Birds, vermin, rodents, or insects; or

(h) Animals owned or kept by an Insured."

If any of these cause water damage not otherwise excluded, from a plumbing, heating, air conditioning or automatic fire protective sprinkler system or household appliance on the "residence premises", we cover loss caused by the water including the cost of tearing out and replacing any part of a building necessary to repair the system or appliance.

We do not cover loss to the system or appliance from which this water escaped.

Under items (1) through (5), any ensuing loss to property described in Cover-

ages A, 8 and C not excluded or, excepted in this policy is covered

2. Under Coverages A and B:

   a. Caused by vandalism and malicious mischief if the dwelling has been vacant for more than 30 consecutive days immediately before the loss. A dwelling being constructed is not considered vacant.

   b. Involving collapse, other than as provided in Additional Coverages — 8, Collapse: However. any ensuing loss to property described in Coverages A and 13 net excluded or excepted in this policy is covered.

3. Under Coverage C caused by:

a. Breakage of:

   (1) Eyeglasses, glassware, statuary, marble;

   (2) Bric-a-brac, porcelains and similar fragile articles other than jewelry, watches, bronzes, cameras and photographic lenses.

   There is coverage for breakage of the property by or resulting from:

   (1) Fire, lightning, windstorm, hail;

   (2) Smoke, other than smoke from agricultural smudging or industrial operations;

   (3) Explosion, riot, civil commotion

(4) Aircraft, vehicles, vandalism and malicious mischief;

(5) Collapse of a building or any part of a building;

(6) Water not otherwise excluded;

(7) Theft or attempted theft; or

(8) Sudden and accidental tearing apart, cracking, burning or bulging of:

(a) A steam or hot water heating system;

(b) An air conditioning or automatic fire protective sprinkler system; or

(c) An appliance for heating water;

b. Dampness of atmosphere or extremes of temperature unless the direct cause of loss is rain, snow, sleet or hail;

c. Refinishing, renovating or repairing property other than watches, jewelry and furs;

d. Collision. other than collision with a land vehicle, sinking, swamping or stranding of watercraft, including their trailers, furnishings, equipment and outboard engines or Motors;

e. Acts or decisions, including the failure to act or decide, of any 'person, group, organization or governmental body However, an ensuing loss to property described in Coverage C not excluded or excepted in this policy is covered.

SECTION 1— EXCLUSIONS

1.c. Water Damage: The following paragraphs are added:

Water damage to property described in Coverage C away from a premises or location owned, rented, occupied or controlled by an "insured" is covered.

Water damage to property described in Coverage C on a premises or location owned, rented, occupied or controlled by an "insured" is excluded even if weather conditions contribute in anyway to produce the loss.

All other provisions of this policy apply.

BEST AVAILABLE COPY

POLICY NO. 8402

11/3/03 - 11/3/06
POLICY TERM

$100,000
AMT OF BLDG COV AT TIME OF LOSS

$60,000
AMT OF CONTENTS COV AT TIME OF LOSS

SWORN STATEMENT IN PROOF OF LOSS

ANY PERSON WHO KNOWINGLY AND WITH INTENT TO DEFRAUD ANY INSURANCE COMPANY OR OTHER PERSON FILES A STATEMENT OF CLAIM CONTAINING ANY MATERIALLY FALSE INFORMATION, OR CONCEALS FOR THE PURPOSE OF MISLEADING, INFORMATION CONCERNING ANY FACT MATERIAL THERETO, COMMITS A FRAUDULENT INSURANCE ACT, WHICH IS A CRIME.

23939
IRS CLAIM NO.

ASCOT
AGENCY

AGENCY #

TO WHG FIRST INSURANCE SERVICES:

At time of loss, by the above described policy of insurance, you insured the claimant

PRIES, RICHARD L

15048 SCENIC HIGHWAY 98, POINT CLEAR, AL 36564

against loss to the property described according to the terms and conditions of said policy and of all forms, endorsements, inventories and agreements attached thereto.

TIME AND ORIGIN OF LOSS: At about 12 o'clock P M., on the 29th day of August 2005, the cause of the said loss was HURRICANE KATRINA CAUSED MOBILE BAY TO OVERFLOW, WHICH RESULTED IN A GENERAL AND TEMPORARY CONDITION OF FLOODING TO INSUREDS AND ADJACENT PROPERTIES

OCCUPANCY: The building described, or containing the property described, was occupied at the time of the loss as follows, and for no other purpose whatever: Seasonal Owner Occupied

INTEREST: No other persons or parties have any interest therein or encumbrance thereon, except: PRIES, RICHARD L and NONE LISTED

1	FULL AMOUNT OF INSURANCE payable to the property for which claim is presented is	$ 150,000.00
2	ACTUAL CASH VALUE of building structure	$ 493,618.50
3	ADD ACTUAL CASH VALUE OF CONTENTS or personal property insured	$ 993,808.20
4	ACTUAL CASH VALUE OF ALL PROPERTY	$ 1,095,619.40
5	FULL COST OF REPAIR OR REPLACEMENT (Building and Contents)	$ 827,280.00
6	LESS APPLICABLE DEPRECIATION	$ 78,942.22
7	ACTUAL CASH VALUE LESS 6	$ 841,337.78
8	LESS DEDUCTIBLES	$ 691,337.78
9	NET AMOUNT CLAIMED (value above reimbursed) if any is	$ 150,000.00

This said loss did not originate by any act, design or procurement on the part of your Insured, nor has any fraud been done by or with the policy or consent of your Insured to obtain the conditions of the policy, or receipt it void; no articles are mortgaged herein or by agreement added thereto but such as were destroyed at the time of said loss, nor property saved has in any manner been concealed, and no attempt to deceive the said Insurer as to the extent of said loss, has in any manner been made. Any other information that may be required will be furnished and receipts and vouchers given for the same.

See Addendum "A" Attached

Subrogation - To the extent of the amount of this claim we surrender upon this policy, the Insured hereby assigns, transfers and sets over to the Insurer all rights, claims or interest that he has against any persons, firm or corporation for the loss or damage to the property for which payment is now or afterward. He also hereby authorizes the Insurer to sue any such third party in his name.

The Insured hereby warrants that no release has been given or will be given or settlement or compromise made or agreed upon with any third party who may be liable in damages to the Insured with respect to the said loss, except as herein stated.

The furnishing of this blank or the preparation of proofs by a representative of any above Insurer is not a waiver of any of their rights.

State of Louisiana
County of East Baton Rouge

Richard L Pries
Insured

Subscribed and sworn to before me this 11th day of April, 2006

Notary Public #165908

RP0000137

EXHIBIT "7"

Addendum to Sworn Statement in Proof of Loss.

The property located at 13049 Scenic Highway 98, Point Clear, Alabama incurred a total loss of in excess of $1,700,000 ("Total Loss"). Of this amount, $1,200,000 of the loss relates to the premises and $500,000 of the loss relates to the personal property. The total amount that has been paid from flood insurance, assuming your timely payment is approximately $450,000, leaving a loss as of this date to the undersigned of $1,250,000. Nothing in the Sworn Statement in Proof of Loss should be construed as a waiver of the right to seek recovery from any other insurer for any reason other than flood, including but not limited to coverage which exists based upon the wind being the primary cause, intervening causes or substantial causes of the damage to the premises and personal property. Any assignment and right of subrogation of the insured's recovery from any other insurer exists only to the extent any recovery is made by the undersigned of any amounts in excess of the Total Loss. In the event of any conflict between this Addendum and the form entitled "Sworn Statement in Proof of Loss", the terms of this Addendum shall be controlling.

9/19/06
(Date)

(Signature)
Robert L. Preis

RP0000138

EXHIBIT "8"

APPENDIX L

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 06-0360-WS-C

RICHARD PREIS AND VICTORIA HEARIN PREIS

versus

LEXINGTON INSURANCE COMPANY, T & B, LTD. D/B/A THAMES, BATRÉ, MATTEL BEVILLE and ISON, and ALLEN LADD

PLAINTIFFS' MOTION IN LIMINE

Now into court, through undersigned counsel, come Plaintiffs, RICHARD PREIS AND VICTORIA HEARIN PREIS ("Plaintiffs"), who move this Honorable Court to order that Defendant, Lexington insurance Company, is barred from offering, filing, introducing, or admitting certain testimony or exhibits at trial.

On or about August 29, 2005, the Plaintiffs' home on Mobile Bay was totally destroyed by Hurricane Katrina. The house has a replacement value in excess of $1,200,000. In addition, Plaintiffs suffered a loss in excess of $750,000.00 in personal property. Lexington issued the insurance policy ("Policy") to Plaintiffs, which provides coverages to Plaintiffs for loss or damage to the their dwelling, personal property, and other policies related to their property located at

15049 Scenic Highway 98, Point Clear, Alabama. The Policy has limits of $634,000 under Coverages A & B for loss of dwelling and other structures and $317,000 under Coverage C for dwelling contents, as well as other coverages, including, additional living expenses and ordinance and law coverages The parties agree that the winds of Hurricane Katrina damaged the Preis' home. The parties also agree that Defendant, Lexington., has a Program Administer Agreement with T & B, Ltd. d/b/a Thames, Batré, Mattel, Beville, and Ison, and Allen Ladd to sell policies in Alabama.

The Plaintiffs claim that the winds caused two major walls in their house to fail resulting in a total loss and demolition of the house and further, that Lexington has attempted to minimize the damage caused by winds to the house by only offering to pay approximately $53,135 to fund the construction of a new house and contents, with a replacement value approaching $1.8 million, even though the amount of the coverage for the dwelling was $634,000 and $317,000 for the personal contents and therefore, breaching their contract with the Plaintiffs.

Based upon these assertions and the matters to be tried at the upcoming jury trial set to begin on August 13, 2007 before this Honorable Court, Plaintiffs hereby object to the following trial exhibits proposed by Lexington and potential testimony relating to certain topics for the reasons more fully explained the accompanying Memorandum in Support of Motion in Limine:

1. Overall request for limitation of the introduction of the Plaintiffs settlement with other insurers that provided coverage for flood to their home

Plaintiffs move this Honorable Court to limit the introduction of any evidence, exhibits, and potential testimony which may relate to any amount received in settlement by them from other insurers relating to the flooding of their Point Clear home during Hurricane Katrina. Plaintiffs also move this Court to exclude all policy provisions or correspondence stating that the subject homeowners policy does not cover flood damage. This fact is undisputed. This evidence is irrelevant, serves little or no probative value, and is overly prejudicial.

Although Plaintiffs admit they received insurance proceeds from their separate flood policies, the Plaintiffs also contend their home was damaged in excess of those payments by wind. The issue in this case is how much damage was caused by wind, which contributed to the Plaintiffs' total loss of approximately $1,800,000.00. More specifically, can the defendant prove by a preponderance of the evidence what, if any, amount of damage was caused by an excluded peril. The coverage afforded Plaintiffs under their homeowners policy with Lexington is a separate and independent question of breach of contract.

Louisiana Civil Code article 2323 provides that in an action for damages where a person suffers an injury, the degree or percentage of fault of all persons causing or contributing to the injury shall be determined. The amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury. La. C. C. art. 2323. In this case, the jury will be asked to determine the amount of the loss attrib-

utable to wind. Comparative fault must be pleaded as an affirmative defense, and the party asserting the defense bears the burden of proving, by a preponderance of the evidence, that the negligence of the other party was a cause in fact of the accident. *Trahan v. Savage Industries, Inc.*, 96-1239 (La. App. 3 Cir. 3/5/97), 692 So.2d 490; *Otillio v. Entergy Louisiana, Inc.*, 836 So.2d 293,295 (La. App. 5th Cir. 2002). Under Louisiana law, the burden of proving at trial the liability of a settling defendant falls on the remaining defendants. *Raley v. Carter*, 412 So.2d 1045, 1047 (La.1982); *Norfleet v. Lifeguard Transp. Service, Inc.*, 2005-0501 (La. App. 4 Cir. 5/17/06); 934 So.2d 846, 852; *Hoerner v. ANCO Insulations Inc*, 2000-2333 (La. App. 4 Cir. 1/23/02), 812 So.2d 45, 66.

The Eleventh Circuit Court of Appeal has explained that a federal district court applies the Federal Rules of Evidence because these rules are considered procedural, regardless of the source of the law that governs the substantive decision. Cf. Farnsworth on Contracts § 7.2 at 196 & n. 16 (citing cases). *MCC-Marble Ceramic Center, Inc., v. Ceramic Nuova d'Agostino, S.p.A.* 144 F.3d 1384, 1389 (CA.11 (Fla.) 1998). Further, these documents were prepared as settlement documents and are not admissible in accordance with Rule 408 of the Federal Rules of Evidence, which provides in pertinent part: "Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount Evidence of conduct or statements made in compromise negotiations is likewise not admissible. . ." Fed. R. Evid. 408.

This Honorable Court in *Armstrong v. HRB Royalty, Inc.*, 392 F.Supp.2d 1302 (S.D. Ala. 2005), explained that Rule 408 of the Federal Rules of Civil Procedure preclude the admission of settlement evidence by writing:

> By its terms, Rule 408 precludes the admission of evidence concerning an offer to compromise "a claim" for the purpose of proving (or disproving) the fact or amount of "the claim." Gauged either by standard usage of the English language or by accepted rules of statutory construction, the definite article "the" limits "the claim" as to which evidence may not be admitted to the claim previously referenced, i.e., the claim which was the subject of a settlement offer.[1] Thus, "Rule 408 excludes evidence of settlement offers only if such evidence is offered to prove liability for or invalidity [or amount] *of the claim under negotiation.*" *Vulcan Hart Corp. V. National Labor*

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[1] *See, e.g., Merriam-Webster's Collegiate Dictionary* 1221 (10th ed.1994)("the" is "used as a function word to indicate that a following noun or noun equivalent is definite or has been previously specified by context or by circumstance"); *American Bus Association v. Slater,* 231 F.3d 1, 4-5 (D.C.Cir.2000)("It is a rule of law well established that the definite article 'the' particularizes the subject which it precedes. It is a word of limitation as opposed to the indefinite or generalizing force of 'a' or 'an.' ")(internal quotes omitted); *In re: Top Grade Sausage, Inc.,* 227 F.3d 123, 129 (3rd Cir.2000)(use of "the trustee" in 11 U.S.C. § 330(a)(1)(A) referred back to "a trustee" as used in the preceding subsection); *Miller's Apple Valley Chevrolet Olds-Geo, Inc. v. Goodwin, 177* F.3d 232, 234 (4th Cir. I999)(where the first sentence of 49 U.S.C. § 32710(b) authorized [a] person" to bring suit while the second sentence authorized a court to award attorney's fees to "the person," "[t]he definite article defines 'person' to be a particular person and not any person [, and] Mlle only antecedent possible is the 'person' described in the first sentence . . . .").

Relations Board. 718 F.2d 269, 277 (8th Cir.1983) (emphasis added).[2] The Court concludes that Rule 408 unambiguously* 1305 requires that the claim as to which a settlement offer was made and the claim at issue in the litigation in which the offer is proffered as evidence must be the same claim.

Armstrong v. HRB Royalty, Inc., 392 F.Supp.2d 1302, 1304 -1305 (S.D. Ala. 2005).

2. Objection to Defendant's Exhibits 6, 8, 12, 13, 14, 16, 18 relating to flood insurance claims:

Plaintiffs object to defense exhibits relating to flood insurance claims and/or adjuster reports or informa-

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[2] *Accord Uforma/Shelby Business Forms, Inc. v. National Labor Relations Board,* 111 F.3d 1284, 1293-94 (6th. Cir.1997)(" 'Rule 403 only bars the use of compromise evidence to prove the validity or invalidity of the claim that was the subject of the compromise, not some other claim.'") (quoting 23 Charles A. Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence §* 5314 (1st ed.1980)); *Broadcort Capital Corp. v. Summa Medical Corp.,* 972 F.2d 1183, 1194 (10th Cir. I 992)(Rule 408 does not apply when the settlement discussions "involved a different claim than the one at issue in the current trial"); *Bradbury v. Phillips Petroleum Co.,* 815 F.2d 1356, 1363 (10th Cir.1987)("Read literally, the rule does not appear to cover compromises and compromise offers that do not involve the dispute that is the subject of the suit, even if one of the parties to the suit was also a party to the compromise."); *see also Zurich American Insurance Co. v. Watts Industries, Inc.,* 417 F.3d 682, 689 (7th Cir.2005)("The balance is especially likely to tip in favor of admitting evidence when the settlement communications at issue arise out of a dispute distinct from the one for which the evidence is being offered,"); *Fiberglass Insulators, Inc. v. Dupuy,* 856 F.2d 652, 655 (4th Cir.1988) (appearing to recognize that "offering an item of evidence is not in terms barred by Rule 408" if it is not offered "to show the validity or invalidity of the compromised claim").

tion. The Court should exclude the introduction of these exhibits. The Plaintiffs do not dispute they receive flood insurance policy proceeds from flood policies. The amounts received are not in dispute. The admission of these exhibits would serve no probative value and only serve to prejudice the jury. The issue before the jury is how much of the Plaintiffs' total loss can the defendant prove was caused by an excluded peril.

Further, National Flood Insurance Program and Excess Flood insurance documents, policies and estimates are inadmissable because they are irrelevant as to the issue of causation of the Plaintiffs' loss. The flood policies were separate policies from the policy at question in this case and they and the amount of payments made are irrelevant as to coverage under the Lexington policy in this matter. Specifically, Plaintiffs object to Defendant's Exhibits 6, 8, 12, 13, 14, 16, 18 and/or other documents related to this issue and not specifically listed by Defendants. Additionally, Plaintiffs object to each of these exhibits as there are not relevant to the issue of causation, which is before the Court.

3. Objection to Defendant's Exhibits 2, 3, 4,5, 8, and 18 relating to Defendant's use to show causation of damages to Plaintiffs' house

Plaintiffs object to Defendant's Exhibits 2, 3, 4, 5, 8, and 18 to the extent that the documents and/or estimates are to be used to determine the causation of damage to the Preis' house. These estimates and evaluations were not made by an expert, engineer, or anyone with qualifications to deem causation of the damage to the Preis' house and/or other documents related to this issue and not specifically listed by Defendant.

4. Objection to Testimony Regarding Plaintiffs' flood insurance claims and/or adjuster reports or information regarding settlement with other insurers that provided flood insurances to Preis.

Plaintiffs object to any reports or statements made by Tracy Clark, Fred Frost, James Gibson, and Darrell Edwards regarding the flood insurance claims and/or adjuster reports, or information regarding settlement with other insurers that provided flood insurance, or their opinions and testimony. Said statements and reports are hearsay. They are out of court statements offered for the truth of the matter asserted. Also, these persons have not been admitted as experts and cannot offer opinion testimony.

5. Objection to Defendant's Exhibits 21 through 44:

Plaintiffs object to Defendant's Exhibits 21 through 44 based upon the relevance as these documents are not relevant to the issue of causation and damages to Plaintiffs' house. Further, there is no question that the Lexington Insurance Company policy was issued and in full force and effect on the Preis' house at the time of the damages. The Lexington policy renewals are not relevant and have no bearing on the issue of causation before the Court.

6. Additional Objections to Defendant's Exhibits:

Plaintiffs object to the offer, introduction, or admission of the below identified exhibits for the particular reasons as stated herein below:

Exhibit 9: Plaintiffs object to the introduction of Exhibit 9 based upon failure of Defendant's counsel to timely provide a copy of this document to Plaintiffs. No such document was received on or about March 13, 2007.

Further, Plaintiffs' counsel have requested that an additional copy of said proposed document be produced and *was* advised that Defendant was unable to do so at this time. Plaintiff requested this document once again at the Pre-Trial conference before this Court. Plaintiffs object to Exhibit 9 based upon its authenticity, prejudicial value, misleading and confusing tendency and hearsay. Plaintiffs reserved the right to withdraw this objection upon production of a complete copy of Exhibit 9 from Defendant.[3]

Exhibit 10: Plaintiffs object to Exhibit 10 based upon lack of authenticity as this proposed exhibit is incomplete and does not contain the referenced enclosure.

Exhibit 15: Plaintiffs object to Exhibit 15 based upon lack of authenticity as this proposed exhibit is incomplete and does not contain the pages LEX Preis 00922-00924. Further, Plaintiffs object to this document as it is cumulative based upon Exhibit 45, which does contain the pages LEX Preis 00922-00924.

Exhibit 19: Plaintiffs object to Exhibit 19 based upon the lack of authenticity of this document as pages LEX Preis 00051-00060 do not constitute a part of the Preis insurance policy.

---

[3] Plaintiffs are unable to attach a copy of Exhibit 9 for consideration by the Court based upon Defendant's failure to provide a copy of said document.

Exhibits 21, 22, 28, 30, 31, 33, 34:

Plaintiffs object to these documents based upon lack of authenticity and hearsay as these documents are unsigned, incomplete correspondence.

Exhibits 24, 26, 35, 44:

Plaintiffs object to these documents based upon lack of authenticity and hearsay as these documents are unsigned, incomplete correspondence and fail to include the enclosures which are referenced in the various correspondence.

Exhibits 36, 37 38, 39, 40, 41, 43:

Plaintiffs object to these documents based upon lack of authenticity as these documents are incomplete correspondence, which fail to include the enclosures referenced in the various correspondence.

Exhibit 45: Plaintiffs object to Exhibit 45 as it is cumulative based upon Exhibit 15, which does contain the pages LEX Preis 00922-00924. Please see objection to Exhibit 15.

Each of these documents are clearly inadmissible in these proceedings and further will cause undue prejudice, delay and jury confusion should this court admit them.

Wherefore, for the reasons stated herein as well as those more fully stated in Plaintiffs' Memorandum in Support of Motion in Limine, Plaintiffs, RICHARD PREIS AND VICTORIA HEARIN PREIS, pray that their motion be granted and for all general and equitable relief.

Respectfully submitted by:

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APPENDIX M

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 06-0360-WS-C

RICHARD PREIS AND VICTORIA HEARIN PREIS

versus

LEXINGTON INSURANCE COMPANY, T & B, LTD. D/B/A THAMES, BATRÉ, MATTEL BEVILLE and ISON, and ALLEN LADD

JURY TRIAL DEMANDED

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION IN LIMINE

MAY IT PLEASE THE COURT:

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On or about August 29, 2005, the Plaintiffs' home on Mobile Bay was totally destroyed by Hurricane Katrina. The house has a replacement value in excess of $1,200,000. In addition, Plaintiffs suffered a loss in

excess of $750,000.00 in personal property. Lexington issued the insurance policy ("Policy") to Plaintiffs, which provides coverages to Plaintiffs for loss or damage to the their dwelling, personal property, and other policies related to their property located at 15049 Scenic Highway 98, Point Clear, Alabama. The Policy has limits of $634,000 under Coverages A & B for loss of dwelling and other structures and $317,000 under Coverage C for dwelling contents, as well as other coverages, including, additional living expenses and ordinance and law coverages. The parties agree that the winds of Hurricane Katrina damaged the Preis' home. The parties also agree that Defendant, Lexington, has a Program Administer Agreement with T & B, Ltd. d/b/a Thames, Batre, Matei, Beville, and Ison, and Allen Ladd to sell policies in Alabama.

The Plaintiffs claim that the winds caused two major walls in their house to fail resulting in a total loss and demolition of the house and further, that Lexington has attempted to minimize the damage caused by winds to the house by only offering to pay approximately $53,135 to fund the construction of a new house and contents, with a replacement value approaching $ 1.8 million, even though the amount of the coverage for the dwelling was $634,000 and $317,000 for the personal contents and therefore, breaching their contract with the Plaintiffs.

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to wind. Comparative fault must be pleaded as an affirmative defense and the party asserting the defense bears the burden of proving, by a preponderance of the evidence, that the negligence of the other party was a cause in fact of the accident. *Trahan v, Savage Industries, Inc.*, 96-1239 (La. App. 3 Cir. 3/5/97), 692 So.2d 490; *Otillio v. Entergy Louisiana, Inc.*, 836 So.2d 293,295 (La. App. 5th Cir. 2002). Under Louisiana law, the burden of proving at trial the liability of a settling defendant falls on the remaining defendants. *Raley v. Carter*, 412 So.2d 1045, 1047 (La.1982); *Norfleet v. Lifeguard Transp. Service, Inc.*, 2005-0501 (La. App. 4 Cir. 5/17/06); 934 So.2d 846, 852; *Roemer v. ANCO Insulations, Inc.*, 2000-2333 (La. App. 4 Cir. 1/23/02), 812 So.2d 45, 66.

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Further, these documents were prepared as settlement documents and are not admissible in accordance with Rule 408 of the Federal Rules of Evidence, which provides in pertinent part: "Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compro-

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> FN3. *See, e.g., Merriam-Webster's Collegiate Dictionary* 1221 (10th ed. 1994)("the" is "used as a function word to indicate that a following noun or noun equivalent is definite or has been previously specified by context or by circumstance"); *American Bus Association v. Slater*, 231 F.3d 1, 4-5 (D.C.Cir.2000)("It is a rule of law well estab-

lished that the definite article 'the' particularizes the subject which it precedes. It is a word of limitation as opposed to the indefinite or generalizing force of 'a' or 'an.' "](internal quotes omitted); *In re: Top Grade Sausage, Inc.*, 227 F.3d 123, 129 (3rd Cir.2000)(use of "the trustee" in 11 U.S.C. § 330(a)(1)(A) referred back to "a trustee" as used in the preceding subsection); *Miller's Apple Valley Chevrolet Olds-Geo, Inc. v. Goodwin*, 177 F.3d 232, 234 (4th Cir.1999)(where the first sentence of 49 U.S.C. § 32710(b) authorized "[a] person" to bring suit while the second sentence authorized a court to award attorney's fees to "the person," "[t]he definite article defines 'person' to be a particular person and not any person [, and) [t]he only antecedent possible is the 'person' described in the first sentence . . . .").

FN4. Accord *Uforma/Shelby Business Forms, Inc. v. National Labor Relations. Board*, 111 F.3d 1284, 1293-94 (6th Cir.1997)("'Rule 408 only bars the use of compromise evidence to prove the validity or invalidity of the claim that was the subject of the compromise, not some other claim.'") (quoting 23 Charles A. Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence* § 5314 (1st ed.1980)); *Broadcort Capital Corp. v. Summa Medical Corp.*, 972 F.2d 1183, 1194 (10th Cir.1992)(Rule 408 does not apply when the settlement discussions "involved a different claim than the one at issue in the current *trial"); Bradbury v. Phillips Petroleum Co.*, 815 F.2d 1356, 1363 (10th Cir.1987) ("Read literally, the rule does not appear to cover compromises and compromise offers that do not involve the dispute that is the subject of the suit, even if one of the parties to the suit was also a

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Armstrong v. HRB Royalty, Inc., 392 F.Supp.2d 1302, 1304 -1305 (S.D. Ala. 2005).

2. Objection to Defendant's Exhibits 6, 8, 12, 13. 14. 16, 18 relating to flood insurance claims:

Plaintiffs object to defense exhibits relating to flood insurance claims and/or adjuster reports or information. The Court should exclude the introduction of these exhibits. The Plaintiffs do not dispute they receive flood insurance policy proceeds from flood policies. The amounts received are not in dispute. The admission of these exhibits would serve no probative value and only serve to prejudice the jury. The issue before the jury is how much of the Plaintiffs' total loss can the defendant prove was caused by an excluded peril.

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the Lexington policy in this matter. Specifically, Plaintiffs object to Defendant's Exhibits 6, 8, 12, 13, 14, 16, 18 and/or other documents related to this issue and not specifically listed by Defendants. Additionally, Plaintiffs object to each of these exhibits as there are not relevant to the issue of causation, which is before the Court.

3. Objection to Defendant's Exhibits 2 3 4 5 8 and 18 relating to Defendant's use to show causation of damages to Plaintiffs' house

Plaintiffs object to Defendant's Exhibits 2, 3, 4, 5, 8, and 18 to the extent that the documents and/or estimates are to be used to determine the causation of damage to the Preis' house. These estimates and evaluations were not made by an expert, engineer, or anyone with qualifications to deem causation of the damage to the Preis' house and/or other documents related to this issue and not specifically listed by Defendant

4. Objection to Testimony Regarding Plaintiffs' flood insurance claims and/or adjuster reports or information regarding settlement with other insurers that provided flood insurances to Preis.

Plaintiffs object to any reports or statements made by Tracy Clark, Fred Frost, James Gibson, and Darrell Edwards regarding the flood insurance claims and/or adjuster reports, or information regarding settlement with other insurers that provided flood insurance, or their opinions and testimony. Said statements and reports are hearsay. They are out of court statements offered for the truth of the matter asserted. Also, these persons have not been admitted as experts and cannot offer opinion testimony.

5. Objection to Defendant's Exhibits 21 through 44:

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6. Additional Objections to Defendant's Exhibits:

Plaintiffs object to the offer, introduction, or admission of the below identified exhibits for the particular reasons *as* stated herein below:

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Exhibit 10: Plaintiffs object to Exhibit 10 based upon lack of authenticity as this proposed exhibit is incomplete and does not contain the referenced enclosure.

Exhibit 15: Plaintiffs object to Exhibit 15 based upon lack of authenticity as this proposed exhibit is incomplete and does not contain the pages LEX Preis 00922-00924. Further, Plaintiffs object to this document as it is cumulative based upon Exhibit 45, which does contain the pages LEX Preis 00922-00924.

Exhibit 19: Plaintiffs object to Exhibit 19 based upon the lack of authenticity of this document as pages LEX Preis 00051-00060 do not constitute a part of the Preis insurance policy.

Exhibits 21, 22, 28, 30, 31, 33, 34:

Plaintiffs object to these documents based upon lack of authenticity and hearsay as these documents are unsigned, incomplete correspondence.

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plete correspondence, which fail to include the enclosures referenced in the various correspondence.

Exhibit 45: Plaintiffs object to Exhibit 45 as it is cumulative based upon Exhibit 15, which does contain the pages LEX Preis 00922-00924. Please see objection to Exhibit 15.

Each of these documents are clearly inadmissible in these proceedings and further will cause undue prejudice, delay and jury confusion should this court admit them.

Wherefore, for the reasons stated herein as well as those more fully stated in Plaintiffs' Memorandum in Support of Motion in Limine, Plaintiffs, RICHARD PREIS AND VICTORIA HEARIN PREIS, pray that their motion be granted and for all general and equitable relief.

Respectfully submitted by:
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Attorneys for Plaintiffs Richard Preis and Victoria Hearin Preis

APPENDIX N

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 06-0360-WS-C

RICHARD PREIS, *et al.*,
Plaintiffs,

v.

LEXINGTON INSURANCE COMPANY, *et al.*,
Defendants.

ORDER

This matter is before the Court on the plaintiffs' motion in limine. (Doc. 173). The parties have filed briefs supporting their respective positions, (Docs. 174, 179),[1] and the motion is ripe for resolution. After carefully considering the foregoing and other relevant materials in the file, the Court concludes that the motion in limine is due to be denied in its entirety.

I. Policy Exclusion for Water Damage.

After rulings on motions for summary judgment and a voluntary dismissal by the plaintiffs, this case boils down to one for insurance benefits. The question is whether and to what extent the insured property suffered wind damage (covered) or water/flood damage (excluded). As insisted by the plaintiffs and held by the Court in an earlier ruling, the insurer bears

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[1] The plaintiffs' brief appears to be a verbatim copy of its motion. Accordingly, the Court cites only to the motion.

the burden of showing the applicability of a policy exclusion. (Doc. 140 at 8; Doc. 162 at 17). Precluding the defendant from introducing the policy exclusion for water damage would effectively preclude the defendant from meeting this burden.

To justify this radical result, the plaintiffs assert that the fact the policy excludes flood damage is undisputed. (Doc. 173 at 2). The Court has indeed made this ruling, (Doc. 162 at 16-17), but the joint proposed pretrial document does not list this fact as agreed. (Dec. 163 at 6). At any rate, the defendant is entitled to introduce the policy to show the existence of the exclusion even if the plaintiffs agree the exclusion exists. Finally, the plaintiffs have waived objection because they have listed the policy, including the exclusion, as an exhibit. (Doc. 163, Exhibit D - at 4, Exhibit 51).

In summary, the plaintiffs' motion in limine with respect to the policy and its exclusion for water damage is denied.

II. Correspondence Concerning Policy Exclusion.

The defendant's exhibit list originally included a number of letters from the broker to the plaintiffs that included a reminder that the policy does not cover flood damage. The defendant has now withdrawn all but one of these exhibits. (Doc. 179 at 15). The plaintiffs object to these exhibits for the same reason they object to the policy itself (Doc. 173 at 2). For reasons similar to those it gave in Part I, the Court rejects this position. The plaintiffs' residual objection of irrelevance, (*Id.* at 7), is incorrect, since the existence of the exclusion is a predicate to the defendant's defense.

In summary, the plaintiffs' motion in limine with respect to correspondence mentioning the exclusion for water damage is denied as moot with respect to all defense exhibits other than Exhibit 41 and is denied with respect to that exhibit.

III. Amounts Received from Flood Insurers.

The plaintiffs made claim under two flood policies (underwritten by Hartford Insurance and Lloyd's of London, respectively) and recovered a total of $587,659.71. (Doc. 105, Exhibit 6 at 21). The plaintiffs offer a welter of reasons why the defendant should be precluded from presenting exhibits or testimony concerning these payments: irrelevance under Rule 401; undue prejudice under Rule 403; settlement under Rule 408; and Louisiana law on comparative fault. (Doc. 173 at 2-5). The Court reviews these arguments in turn.

Evidence is relevant if it "ha[s] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence," Fed. R. Evid. 401. As the plaintiffs recognize, the central issue in the case is how much of the damage to their insured property was caused by the excluded peril of flood. (Doc, 163 at 3). The willingness of the plaintiffs' flood insurers to pay almost $600,000 in flood insurance benefits plainly makes it more probable that the property suffered substantial flood damage, as does the plaintiffs' willingness to accept that sum.

Relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." Fed. R. Evid. 403. Any evidence that helps one side presumably prejudices the other,

but that does not make the prejudice "unfair," and the plaintiffs have failed to explain the unfairness of any prejudice to them. Nor have they attempted to show that the danger of unfair prejudice not only exists but outweighs substantially — the probative value of the evidence. Quite a bit of unfair prejudice would have to be shown in order to "substantially outweig[h]" the significant probative value of the payment and acceptance of almost $600,000 in flood insurance benefits in showing the amount of damages caused by flood.

Rule 408 prohibits the defendant from offering evidence that the plaintiffs and their flood insurers compromised a disputed claim for flood insurance benefits. Assuming without deciding that there are no additional defects in the plaintiffs' invocation of this rule, they have failed to argue that the flood insurers disputed their claim for benefits or that the amount the flood insurers paid was less than the amount the plaintiffs claimed under the flood policies. On the contrary, the plaintiffs admit they received the policy limits under the Lloyd's policy and the policy limits on the main house on the Hartford policy. (Doc. 105, Exhibit 6 at 21).

As the plaintiffs acknowledge, the Louisiana law on which they rely governs only the determination of comparative fault in negligence cases. (Doc. 163 at 3). Because the plaintiffs' only claim is for breach of contract, the statute is irrelevant.

In summary, the plaintiffs' motion in limine with respect to amounts received from flood insurers is denied.

IV. Flood Policies, Proof of Loss, and Similar Documents.

The plaintiffs challenge in one section a varied collection of documents on the grounds of irrelevance and prejudice. (Doc. 173 at 6).

Defense exhibits 13 and 14 are the declarations pages from the Hartford flood policy.[2] The declarations pages show the limits of coverage for structure and for contents and so are relevant to show the degree to which the plaintiffs were compensated under the policy. The plaintiffs suggest, and the Court can detect, no unfair prejudice.

Defense exhibit 12 is a sworn statement in proof of loss submitted by the plaintiffs to a flood insurer in which they identify the cause of their loss as flooding. Its relevance is obvious and its prejudicial effect anything but unfair.

Defense exhibit 16 is a letter from the defendant to the plaintiffs enclosing a proof of loss form. While its relevance may be slight, its unfair prejudice is non-existent.

In summary, the plaintiffs' motion in limine with respect to these exhibits is denied.

V. Adjuster Reports.

Defense exhibits 2-5 are adjuster reports prepared in response to the plaintiffs' claim under the defendant's policy. Defense exhibits 6 and 18 are an adjuster summary and a claim summary prepared by Fred Frost on behalf of Precise Adjustments, Inc., which made payment on the flood policy underwrit-

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[2] There is one declarations page for the main house and another for the guest house.

ten by Lloyd's. (Doc. 105, Exhibit 6 at 21). All conclude, in varying degrees of detail, that the bulk of the damages to the plaintiffs' property resulted from flood rather than wind. The plaintiffs object that the adjusters lack adequate qualifications to reach such conclusions. (Doc. 173 at 6).[3]

None of the individuals preparing the challenged exhibits was identified by the defendant as an expert witness. (Doc. 163 at 31). A lay witness may offer opinions "which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) riot based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701. The plaintiffs have not addressed Rule 701, and there is no indication before the Court that any of these requirements for lay opinion testimony is lacking. To the extent the rule requires that the witnesses "testif[y] based upon their particularized knowledge garnered from years of experience within the field,[4] the record likewise is inadequate to support the conclusion that the requirement is unsatisfied.

In summary, the plaintiffs' motion in limine with respect to these exhibits is denied without prejudice to the plaintiffs' ability to challenge them at trial.

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[3] With respect to the Frost documents, the plaintiffs also argue that they lack relevance and are unfairly prejudicial. (*Id.*). Because they identify in detail the damages this flood insurer considered to be caused by flood, the documents are quite relevant. The plaintiffs do not identify any unfair prejudice from the documents, and the Court detects none.

[4] *Tampa Bay Shipbuilding & Repair Co. v. Cedar Shipping Co.*, 320 F.3d 1213, 1223 (11th Cir. 2003).

VI. Hearsay Testimony.

The plaintiffs object to any testimony by four named individuals[5] with respect to any hearsay testimony they may offer on certain topics. (Doc. 173 at 7). Without an identification of the offending testimony, the Court cannot determine whether it is hearsay or whether it is admissible as an exception to the hearsay rule.

In summary, the plaintiffs' motion in limine with respect to hearsay testimony is denied, without prejudice to the plaintiffs' ability to assert this objection at trial.

VII. Residual Challenges.

The plaintiffs object to particular documents on such grounds as lack of authenticity, cumulativeness, hearsay, and failure to produce. (Doc. 173 at 7-8). The Court cannot rule on these objections in the current vacuum.

In summary, the plaintiffs' motion in limine with respect to these exhibits is denied, without prejudice to the plaintiffs' ability to assert their objections at trial.

DONE and ORDERED this 7th day of August, 2007.

/s/ William H. Steele
WILLIAM H. STEELE
United States District Judge

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[5] Tracy Clark, Fred Frost, James Gibson, and Darrell Edwards.

APPENDIX O

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 06-0360-WS-C

RICHARD PREIS, *et al.*,
Plaintiffs,

versus

LEXINGTON INSURANCE COMPANY, *et al.*,
Defendants.

ORDER

This matter is before the Court on the motion for summary judgment filed by defendant Lexington Insurance Company ("Lexington"), and on the plaintiff's motion for partial summary judgment. (Docs. 105, 106). The parties have filed briefs and evidentiary materials in support of their respective positions, (Docs. 105, 107-09, 138-42, 145, 152), and the motions are ripe for resolution. After carefully considering the foregoing and other relevant materials in the file, the Court concludes that Lexington's motion is due to be granted in part and denied in part and that the plaintiffs' motion is due to be denied.

BACKGROUND

The plaintiff's' home on Mobile Bay was damaged during Hurricane Katrina in August 2005, while insured under a homeowner's policy ("the Policy') issued by Lexington through co-defendants T & B, Ltd. ("T&B") and Edward Ladd. The home was

ultimately demolished as ordered by local government, and the plaintiffs assert that their total losses approach $1.8 million. At least some of the damage was caused by flooding, and the plaintiffs recovered almost $600,000 under two flood policies issued by other entities. They now seek additional recovery under the Policy. Lexington relied on a Policy exclusion for flood damage and offered the plaintiffs approximately $64,000 as compensation for wind damage. The plaintiffs insist that the Policy covers flood damage and that, in any event, the bulk of their damages were caused by wind rather than flood.

The amended complaint asserts the following claims against Lexington:

- Count One: Declaratory relief
- Count Two: Breach of contract/reformation
- Count Three: Bad faith failure to pay/investigate
- Count Seven: Liability for acts and omissions of T&B and Ladd
- Count Eight: Negligent/wanton training and supervision

(Doc. 60 at 11-21).

DETERMINATIONS OF UNCONTROVERTED FACT

The Policy is labeled as "Homeowners 3 Special Form" and carries the following number on each page: "HO 00 03 04 91." (Doc. 140, Exhibit 2 at LEX 006-23). The Policy includes two sections. Section 1 addresses property coverage, while Section a addresses liability coverage. (*Id.* at LEX 007, 017). Property coverage is of four kinds: Coverage A -

Dwelling; Coverage B Other Structures; Coverage C - Personal Property; and Coverage I) - Loss of Use. (*Id.* at LEX 007-08).

The Policy includes a number of endorsements, including one labeled as "Special Personal Property Coverage" and carrying the number, "LEX 15 31 08 01." (Doc. 140, Exhibit 2 at LEX 049-51) ("Endorsement 15"). Under the heading of "Section I - Perils Insured Against," Endorsement 15 reads in pertinent part as follows:

> We insure against risk of direct physical loss to property described in Coverages A, B and C for form HO 00 03 and for Coverage C only for form HO 00 04 and HO 04 06.
>
> We do not insure, however, for loss:
>
> 1. Under Coverages A, B and C:
>
> a. Excluded under SECTION I - EXCLUSIONS;
>
> b. Caused by:
>
> (1) Freezing of a plumbing . . . system or of a household appliance . . .
>
> (2) pressure or weight of water or ice . . . to [certain structures];
>
> (3) Theft . . .;
>
> (4) Mold, fungus or wet rot . . .;
>
> (5) Any of the following [including wear and tear, mechanical self-damage, smog, rust, smoke pollution, settling, and animals].

(*Id.* at 49-50).

A similar provision appears in the original Policy under the same heading, which reads in pertinent part as follows:

> We insure against risk of direct loss to property described in Coverages A and B only if that loss is a physical loss to property. We do not insure, however, for loss:
>
> 1. Involving collapse, other than as provided in Additional Coverage 8.;
>
> 2. Caused by: [a list of items similar to that under Endorsement 15]
>
> 3. Excluded under Section 1 - Exclusions.
>
> Under items 1. and 2., any ensuing loss to property described in Coverages A and B not excluded or excepted in this policy is covered.

(Doc. 140, Exhibit 2 at LEX 011-12 (emphasis added)).

Among the Section I - Exclusions is the following:

> I. We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.
>
> . . .
>
> c. Water Damage, meaning:
>
> (1) Flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind;

(Doc. 140, Exhibit 2 at LEX 013).

The Policy also includes an "Important Flood Insurance Notice," set in large type on a separate page, which begins as follows:

> Your homeowners or dwelling policy does NOT provide coverage for loss caused by flood or mudslide, which is defined, in part, by the National Flood Insurance Program as:
>
> A general and temporary condition of partial or complete inundation of normally dry land areas from overflow of inland or tidal waters or from the unusual and rapid accumulation or runoff of surface waters from any source.

(Doc. 140, Exhibit 2 at LEX 040).

CONCLUSIONS OF LAW

The Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1332. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(3)(2).

Summary judgment should be granted only if "there is no issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment bears "the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial." *Clark v. Coats & Clark Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). Once the moving party has satisfied its responsibility, the burden shifts to the nonmoving party to show the existence of a genuine issue of material fact. *Id.* "If the nonmoving party fails to make 'a sufficient showing on an essential element of her case with respect to which she has the burden of proof,' the moving party is entitled to summary judgment." *Id.*

(quoting *Celotex Corp. v. Catrell*, 477 U.S. 317 (1986)) (footnote omitted).

"When the *moving* party has the burden of proof at trial, that party must show affirmatively the absence of a genuine issue of material fact: it must support its motion with credible evidence . . . that would entitle it to a directed verdict if not controverted at trial. [citation omitted] In other words, the moving party must show that, on all the essential elements of its case on which A bears the burden of proof, no reasonable jury could find for the nonmoving party," *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1438 (11th Cir. 1991) (en banc) (emphasis in original); *accord Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993).

"If the party moving for summary judgment fails to discharge the initial burden, then the motion must be denied and the court need not consider what, if any, showing the non-movant has made. [citation omitted] If however, the movant carries the initial summary judgment burden . . ., the responsibility then devolves upon the non-movant to show the existence of a genuine issue of material fact" *Fitzpatrick*, 2 F.3d at 1116. "For issues on which the movant would bear the burden of proof at trial, the non-movant, in order to avoid summary judgment, must come forward with evidence sufficient to call into question the inference created by the movant's evidence on the particular material fact." *Id.*

Parties may not, by the simple expedient of dumping a mass of evidentiary material into the record, shift to the Court the burden of identifying evidence supporting their respective positions.[1] Similarly,

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[1] *E.g., Jones v. Sheehan, Young & Culp, P.C.*, 82 F.3d 1334, 1338 (5th Cir. 1996) ("Rule 56 . . . does not impose upon the

"Where is no burden upon the district court to distill every potential argument that could be made based upon the materials before it on summary judgment." *Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587.599 (11th Cir. 1995). Accordingly, the Court's review of the parties' submissions is limited to the portions to which they have specifically cited. The Court's review is similarly limited to those legal arguments expressly advanced by the parties.

1. Breach of Contract.

The plaintiffs' claim for breach of contract has two prongs: first, that the Policy covers some or all losses resulting front flood waters; second, that Lexington failed to pay for some losses resulting from wind. After reviewing the interpretive titles applicable to the Policy, the Court addresses these arguments in turn.

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district court a duty to survey the entire record in search of evidence to support a non movant's opposition."); *Street v. J.C Bradford & Co.*, 886 F.2d 1472, 1479-80 (6th Cir. 1989) ("The trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material face"); *Lawson v. Sheriff of Tippecanoe County*, 725 F.2d 1136, 1139 (7th Cir. 1984) ("The judge was not obliged to comb the record for evidence contradicting the defendant's affidavit"); *Karlozian v. Clovis Unified School District*, 2001 WL 488880 at *1 (9th Cir. 2001) ("While pretext evidence may have been buried in [the plaintiff s] 242 page deposition, a district court is not "required to comb the record to fund some reason to deny a motion for summary judgment.") (internal quotes omitted); *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 672 (10th Cir. 1998) ("The district court has discretion to go beyond the referenced portions of these [summary judgment] materials, but is not required to do so."); *see also* Local Rule 7.2.

A. Rules of Construction.

The parties agree that the Policy is to be construed under Louisiana law. (Doc. 140 at 5; Doc. 145 at 3). "The judiciary's role in interpreting insurance contracts is to ascertain the common intent of the parties to the contract . . . If the policy wording at issue is clear and unambiguously expresses the parties' intent, the insurance contract must be enforced as written . . . The determination of whether a contract is clear or ambiguous is a question of law." *Cadwallader v. Allstate Insurance Co.*, 848 So. 2d 577, 580 (La. 2003) (citations omitted).

"Ambiguous policy provisions are generally construed against the insurer and in favor of coverage. . . . Under this rule of strict construction, equivocal provisions seeking to narrow an insurer's obligation are strictly construed against the insurer. That strict construction principle applies only if the ambiguous policy provision is susceptible to two or more reasonable interpretations; for the rule of strict construction to apply, the insurance policy must be not only susceptible to two or more interpretations, but each of the alternative interpretations must be reasonable." *Cadwallader*, 848 So. 2d at 580 (emphasis in original) (citations omitted). That is, lain ambiguity in an insurance policy is said to exist when the pertinent provision can be reasonably construed in two different ways." *Proshee v. Shree, Inc.*, 893 So. 2d 939, 942 (La. Ct. App. 3rd Cir. 2005).

In assessing whether a policy provision is ambiguous, "[w]ords and phrases used in an insurance contract are to be given their generally prevailing and ordinary meaning, unless they have acquired a technical meaning. . . . An insurance contract is construed as a whole and each provision in the policy must be

interpreted in light of the other provisions so that each is given meaning. One portion of the policy should not be construed separately at the expense of disregarding other provisions." *Rolston v. United Services Automobile Association*, 948 So. 2d 1113, 1117 (La. App. 4th Cir. 2006) (citations omitted).

"An insurance contract . . . should not be interpreted in an unreasonable or strained manner under the guise of contractual interpretation to enlarge or to restrict its provisions beyond what is reasonably contemplated by unambiguous terms or achieve an absurd conclusion. . . . The rules of construction do not authorize a perversion of the words or the exercise of inventive powers to create an ambiguity where none exists or the making of a new contract when the terms express with sufficient clearness the parties' intent." *Cadwallader*, 848 So. 2d at 580 (citations omitted).

B. Water Damage.

The parties agree that the plaintiffs' property was damaged by flooding from Mobile Bay. The plaintiffs argue that the Policy is ambiguous as to whether it covers damage from flooding. They offer a number of imaginative arguments in support of this position, which the Court addresses in the order presented.

As a threshold matter, however, the Court notes the enormous handicap with which the plaintiffs begin this exercise. As discussed above, they are not at liberty to conjure up an ambiguity by looking only to an isolated provision of the Policy. Instead, the ambiguity must persist after viewing the provision in the context of the entire Policy, which includes the following pellucid warning on a separate page and in unusually large font: "Your homeowners or dwelling

policy Docs NOT provide coverage for loss caused by flood or mudslide. . . ." (Doc. 140, Exhibit 2 at LEX 040). Quite an impressive showing would be required to render that crystalline disclaimer ambiguous, and the plaintiffs offer nothing impressive. On the contrary, their earnest but flimsy arguments could not demonstrate the existence of an ambiguity even if the Policy did not contain the quoted language.

1. The missing conjunction.

Endorsement 15 has been quoted above.[2] The plaintiffs argue that, because "SECTION 1- EXCLUSIONS;" is not followed by an "and" or an "or," the provision is ambiguous as to whether an exclusion from coverage requires that both subparagraph a. and subparagraph b. be satisfied. The ambiguity must be resolved, they say, by inserting an "and," thereby requiring Lexington to show not only that the loss resulted from Water Damage as defined in the Section I exclusions but in addition that the loss was also caused by one of the items listed under subparagraph b. (Doc. 140 at 8-10).

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[2] There seems to be some confusion as to whether Endorsement 15 affects only Coverage C or also amends Coverages A and B. Lexington, cites its Rule 30(b)(6) deposition for the proposition that only Coverage C is implicated, (Doc. 145 at 10-11), but at least once the deponent appeared to concede that the endorsement applies to Coverages A and B as well. (Doc. 145, Exhibit 10, Moran Deposition at 119). Moreover, Endorsement 15 purports to amend Coverages A and 13 with respect to form HO 00 03, and the Policy bears the number, "HO 00 03 04 91." Lexington itself describes the Policy as the "1103 form." (Doc. 145 at 9). Because the Court finds Endorsement 15 unambiguous, and because Lexington's argument apparently is offered only to limit the damage from an ambiguous endorsement, the Court need not resolve its reach at this time.

The Court does not find the provision to be ambiguous, because the plaintiffs' reading is not reasonable. Were the plaintiffs' interpretation correct, loss resulting from Water Damage would nevertheless be covered unless the loss also resulted from one of the causes identified under subparagraph b., viz.: freezing, theft, mold or similar conditions, wear and tear, self-damage, smog, rust, industrial smoke, pollutants, settling and related movement, or animals. That is, even were a new house swept from its foundation and dashed to bits by a raging flood, the plaintiffs' reading would provide coverage because no settling, mold, rust or so forth caused the loss. Similarly, under the plaintiffs' argument the Policy would provide coverage for loss from war, despite the express exclusion therefor, except on the infinitesimal chance that the loss also resulted from one of the causes listed in subparagraph b.

Nor Docs the plaintiffs' construction comport with the entirety of paragraph 1 of Endorsement 15. No conjunction appears between sub-subparagraphs (1) through (5) of subparagraph b, which are set off from each other only by semicolons. That is, if the plaintiffs' interpretation were accepted, to avoid coverage the loss would not have to fit an exclusion and involve merely one of the causes listed under subparagraph b.; rather, it would have to involve all five of them. Thus, the exclusion for Water Damage would be ineffective unless the loss also resulted from the freezing of a device or system within the house, and the freezing, thawing, pressure or weight of water or ice on certain structures, and theft, and mold, fungus or thy rot, and one of the several options under subsubparagraph (5). The absurdity of the result adequately answers the plaintiffs' argument.

Finally, the plaintiffs' position is incompatible with the language of the exclusions, each of which expressly applies "regardless of any other cause or event contributing concurrently or in any sequence to the loss." (Doc. 140, Exhibit 2 at LEX 013). The plaintiffs' argument could succeed only by ignoring that clear provision, which basic rules of construction prohibit.

2. The expansive application.

A "Composite Application" completed in 2003 has a box checked for "All Risk Contents." (Doc. 140, Exhibit 11 at 1).[3] The plaintiffs reasonably conclude from this that the Policy should have been "all risk" with respect to Coverage C. More dubiously, they argue that, because the application does not identify any exclusions front contents coverage, the Policy is ambiguous as to whether there is an exclusion for Water Damage, at least under Coverage C. (Doc. 140 at 11).

According to a leading treatise, "[An 'all-risk' policy creates coverage of a type not ordinarily present under other types of insurance, and recovery is allowed for fortuitous losses unless the loss is excluded by a specific policy provision . . . ." 10A L.R. Russ & T.F. Segalla, *Couch on Insurance* 148:50 (3rd ed. 2007). More succinctly, "the scope of coverage under an all-risk homeowner's policy includes all risks except those specifically excluded by the policy." *State Farm Fire & Casualty Co. v. Von der Lieth*, 820 P.2d 285, 290-91 (Cal. 1991). It therefore differs from

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[3] The application presumably led to the inclusion of Endorsement 15, since the original Policy did not provide all-risk coverage, as defined in text, for personal property. (Doc. 140, Exhibit 2 at LEX 012-13).

a traditional policy. "All-risk insurance covers all risks that are not specifically excluded in the terms of the contract, and takes the opposite approach of traditional policies, sometimes called 'named perils' or `specific perils' policies, which exclude all risks not specifically named." *Frank Coluccio Construction Co. v. King County,* 150 P.3d 1147, 1150 (Wash. App. 2007).

Lexington insists, without explanation, that the Policy is not an all-risk policy. (Doc. 145 at 7). This seems doubtful, since Coverages A and B under the original Policy, and Coverages A, B and C under Endorsement 15, are all phrased broadly as providing coverage for physical loss to property other than as enumerated; they do not contain a limiting list of insured perils. At any rate, whether the plaintiffs received an all-risk policy, either in toto or with respect to Coverage C, is really inconsequential to Lexington's motion for summary judgment. The plaintiffs have brought no claim based on a failure to deliver the coverage requested, and it is far too late to inject such a claim into these proceedings, even had they moved for leave to do so.

Rather, the plaintiffs' only use of the application's request for all-risk contents coverage is to insist that the application's silence as to any exclusions renders the Policy ambiguous as to whether any such exclusions exist.[4] The threshold problem with this argument is that it assumes the application is itself a part of the Policy. (Doc. 140 at 7). This assumption is tenuously based on the vague agreement of the Rule

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[4] To the extent the plaintiffs imply that an "all-risk" policy automatically insures all loss with no exclusions, the authorities cited in text negate the suggestion.

30(b)(6) deponent with the proposition, "Or this would be part of the contract" (*Id.*, Exhibit 4 at 50). Even if the indefinite term "this" refers to the application, and even if the term "or" does not convert the proposition into a negative, the statement must be read in light of the deponent's immediately preceding testimony that, because the insurer "want[s] to know that the information is true at the thus you're issuing the policy," "the application informs part of that contract." (*Id.*). The apparent meaning of the deponent's testimony is that, because the application provides information concerning such things as the insured property, the types of coverages requested, and the limits and deductibles requested, the insurer looks to the application to ensure that the ensuing policy comports with the application, and in that limited sense the information in the application becomes, by transfer, part of the policy. The exchange cannot easily be construed as a concession that the application is itself a part of the Policy.

Nor would it matter if the deposition could be read as the plaintiffs desire. "Every insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy, and as amplified, extended, or modified by any rider, endorsement, or application attached to or made a part of the policy." La. Rev. Stat. § 22:654. "Whether the application is part of the insurance contract is determined by the parties' intent as reflected by the words in the policy. . . . An application may become part of the insurance contract if sufficiently attached to or incorporated in the policy; however, the intent to make the application part of the insurance contract must be clearly expressed on the face of the policy." *Peterson v. Schimek*, 729 So. 2d 1024, 3031 (La. 1999) (construing Section 22:654). The applica-

tion is not attached to the Policy, (Doc. 140, Exhibit 2), and the Policy Docs not even reference the application, much less express any intent to make it part of the Policy. On the contrary, the Policy expressly identifies the papers that comprise it, and the application is not mentioned.[5] Regardless of what

Lexington's 30(b)(6) deponent may have thought about whether the application was part of the Policy, as a matter of law it could not be.

"A contract must be interpreted within its 'four corners' whenever the words of the contract are clear, explicit, and lead to no absurd consequences." *E.g., Peterson*, 729 So. 2d at 1031. That is, "the use of extrinsic evidence is proper only where a contract is ambiguous after an examination of the four corners of the agreement" *Taylor v. Brandner*, 928 So. 2d 751, 754 (La. App. 5th Cir. 2006) (internal quotes omitted). Extrinsic evidence cannot be used to create ambiguity, only to resolve an ambiguity appearing within the contract itself. Thus, the plaintiffs may not rely on the extrinsic evidence of the application to create an ambiguity in the Policy.

Nor would the application expose any ambiguity within the Policy even if it could be reviewed for that purpose. By its very nature, an application simply collects from the applicant basic information necessary for underwriting and issuing a policy; it does not serve to notify the applicant of all the terms and conditions the policy wilt contain. There is thus nothing inconsistent between an application that Docs not list exclusions from coverage and a policy

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[5] This declaration page with policy provisions and endorsements, if any, issued to form a part, thereof, completes the above numbered homeowner's policy." (*id.* at LEX 001).

that does. Likewise, since an all-risk policy by definition is subject to exclusions, the application's silence concerning exclusions under all-risk coverage introduces no ambiguity as to whether the coverage is subject to them.

3. The double negative.

The pre-Endorsement 15 "Perils Insured Against" language has been quoted above, with two usages of the word "not" highlighted.[6] The plaintiffs argue that "the inclusion of both 'note . . . renders the exclusion language meaningless and ambiguous." (Doc. 140 at 12). They do not offer to explain how this could be so, and it patently is not. The first "nor introduces the exclusions to coverage, while the second "not" limits the reach of certain exclusions. Nothing could be plainer.

The plaintiffs' argument is largely impenetrable, but they indicate they have "two reasons" for finding ambiguity in this provision. (Doc. 140 at 12). Apparently, their second reason has to do with the "printing and presentation" of the quoted language, (*id.* at 11), but they fail to explain how it was defective or how it rendered the Policy ambiguous, To the extent they mean to suggest that the final sentence is ambiguous as to whether "items 1. and 2." refers to the numbered paragraphs immediately above or to numbered paragraphs within "Section 1 - Exclusions,[7]

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[6] Of course, if Endorsement 15 superseded this provision, *see* note 2, *supra*, it is no longer in effect, eliminating the plaintiffs' entire argument directed to it. Because Lexington resists the conclusion that Endorsement 15 applies to Coverages A and B, however, the Court addresses the plaintiffs' argument.

[7] To the extent they mean to suggest anything else, their argument is waived by their failure to articulate it with sufficient clarity to allow its consideration by the Court.

there is no ambiguity. That sentence patently is not an extension of numbered paragraph 3 but is instead a separate, unnumbered paragraph, such that mention of items 1 and 2 is a reference to the numbered paragraphs above it. Moreover, the sentence would be pointless if it referred to paragraphs 1 and 2 of Section 1- Exclusions, because paragraph 2 of that section already contains precisely the same language. (Doc. 140, Exhibit 2 at LEX 014).

4. The restrictive exclusion.

The Policy's exclusion for Water Damage has been quoted above. The plaintiffs argue that the provision excludes only "loss[es] that occur as a result of exposure to water over a period of time" (such as soggy sheet rock and personalty), while leaving losses "caused by the force of water" (such as collapsing structural members) fully covered. (Doc. 140 at 13 (emphasis in original)). They do not disagree that "[f]lood, surface water, waves," etc., is broad enough to include both gentle and violent loss. Instead, they insist that the phrase "Water Damage" limits the exclusion to loss by soaking. (*Id.*).

The plaintiffs do not explain how the term "Water Damage" operates to restrict the exclusion. However, they concede that, were the defined term "Water" rather than "Water Damage," the exclusion would extend to loss caused by the force of water. (Doc. 140 at 13). They thus imagine that adding the word "damage" somehow works the restriction, although how this occurs is left unstated. In fact, the plaintiffs focus on a distinction without a difference; both the house with inundated wallboard and the house with collapsing structural members have experienced water damage.

Moreover, what is excluded is loss caused by flood and other listed forms of surface water, each of which (as the plaintiffs concede) on its face encompasses both gentle and violent loss. The term "Water Damage" cannot change this result, because it merely provides a shorthand name (for use elsewhere in the Policy) for the various forms of water listed. Had the defined term been "water," or even "watermelon" or "water buffalo," the exclusion would still be measured by the definition, not by the defined term.

The plaintiffs also argue that the exclusion does not reach damage caused by debris, even if the debris is carried by flood or other listed waters. (Doc. 140 at 13, 20).[8] To the extent the argument is based on the "Water Damage" nomenclature—which is the only explanation the plaintiffs provide—the argument fails for the reasons stated above. To the extent the argument is based on some other, unarticulated reason, it is waived by the plaintiffs' failure to express it with sufficient clarity to permit its consideration. At any rate, the Policy excludes loss resulting either "directly or indirectly" from flood, and loss from debris that strikes covered property when carried there by flood waters is loss caused indirectly by flood and thus excluded. *Cf. Jones v. Washington National Insurance Co.*, 2 So. 2d 696, 697-98 (La. App. 2nd Cir. 1941) (where the policy excluded coverage for disability caused, directly or indirectly, by venereal disease, and where the plaintiff's accident aggravated a pre-existing aneurysm that resulted from syphilis, the amputation of his foot following a lancing of the aneurysm was an excluded loss).

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[8] There is evidence that the plaintiffs' pier in Mobile Bay was broken up by the force of water and washed to, and into, the house.

5. The descriptive misnomer.

The Policy provides, under the heading, "Section I - Property Coverages," as follows:

> COVERAGE D - Loss of Use
>
> The limit of liability for Coverage D is the total limit for all the coverages that follow
>
> 1. If a loss covered under this Section makes that pad of the "residence premises" where you reside not fit to live in, we cover, at your choice, either of the following.

(Doc. 140, Exhibit 2 at LEX 007-08).

The plaintiffs assert that this language makes Coverage D its own separate "Section" of the Policy and that, since Coverage D mentions no exclusions, there is no exclusion for Water Damage for purposes of loss-of-use coverage. (Doc. 140 at 13-14). The assertion is patently wrong. Coverage D is not a "section" but a provision. The only "Section" of which it is a part is Section I, and it is to that section that the language, "this Section," refers. Because Section I includes the Water Damage exclusion, that exclusion applies to Coverage D as it Docs to Coverages A, B, and C.

6. The windy opening.

Coverage C of the original Policy, under the heading, "Section I - Perils Insured Against," provided coverage for specific, listed perils, including "windstorm or hail." (Doc. 140, Exhibit 2 at LEX 011-12). The plaintiffs note that this covered peril "does not include loss to the property contained in a building caused by rain, snow, sleet, sand or dust unless the direct force of wind or hail damages the building causing an opening in a roof or wall and rain, snow,

sleet, sand or dust enters through this opening." (*Id.* at LEX 012). The plaintiffs conclude that, if wind created the opening(s) through which the flood waters entered the house, the quoted language provides them coverage for resulting loss to personalty inside. (Doc. 140 at 14-15).

The threshold fatal defect in this argument is that it relies on language that was superseded by Endorsement 15: "The Perils Insured Against under Coverage C are deleted and replaced by the following (Doc. 140, Exhibit 2 at LEX 049). Nor does the argument hold water even in the context of original Coverage C.

First, the quoted language addresses "rain, snow, sleet, sand [and] dust, not flood waters, so that it is facially inapplicable to the plaintiffs' situation. Second, Coverage C unsurprisingly states that it covers toss from the listed perils, including windstorm and hail, "unless the loss is excluded in SECTION I - EXCLUSIONS." (Doc. 140, Exhibit 2 at LEX 012). The Water Damage exclusion, of course, is one of those exclusions. Thus, damage to personalty from flood waters is unambiguously excluded, regardless of whether wind first created a hole in a wall through which the flood waters poured.

7. The broker's gaffe.

Finally, the plaintiffs complain that defendant Ladd represented to them that "[e]verything is covered unless it is specifically excluded. Coverages include wind/hurricane, fire, vandalism, theft, etc." (Doc. 140, Exhibit 23). They argue that, Ladd and T&B are agents of the Lexington, this representation by Ladd to Preis alters the terms of the coverage and creates an ambiguity." (Doc. 140 at 15).

The question of the relation of Ladd and T&B to Lexington is addressed in Part III but, even if they were Lexington's agents, Ladd's statement could neither alter the Policy terms nor create an ambiguity as to their meaning. As discussed in Part I.B..2, only those documents incorporated by reference are part of the Policy, and Ladd's letter is not mentioned anywhere in the Policy. As also previously discussed, only the Policy may be reviewed in determining whether an ambiguity exists. Because the letter is not part of the Policy, it is irrelevant to that threshold determination.

In summary, the Policy unambiguously excludes coverage for loss caused by flood waters, whether or not driven by wind, and. including loss caused indirectly by debris carried by flood waters. Lexington is entitled to summary judgment with respect to the plaintiffs' claims for coverage for flood damage.

C. Wind Damage.

The parties agree that the Policy covers loss from wind. Lexington contends that the amount of wind damage was limited to the $64,167.86 it tendered the plaintiffs. The plaintiffs contend that wind, rather than flood, caused two walls of the house to collapse, which in turn required the structure's demolition, such that the damage attributable to wind is much greater than Lexington concedes.

"The insurer bears the burden of proving the applicability of an exclusionary clause within a policy." *Blackburn v. National Union Fire Insurance Co.*, 784 So. 2d 637, 641 (La. 2001). Thus, on motion for summary judgment Lexington bears the initial burden of showing affirmatively that no reasonable jury could find less flood damage, and more wind damages than Lexington contends.

To meet its burden, Lexington offers the affidavit of its expert, Van Fisher, who states in conclusory fashion that, in his professional opinion, all damage but the roughly $64,000 tendered by Lexington was from flood, not wind. (Doc. 105, Exhibit 9). Assuming without deciding that an unexplained expert conclusion is sufficient to carry a movant's initial burden, the inquiry becomes whether the plaintiffs have come forward with evidence sufficient to call into question the inference created by Fisher's affidavit.

The plaintiffs rely on their own expert, William Sealy. Using wind speed data from AccuWeather reports and formulae from American Society of Civil Engineers ("ASCE") 7, Sealy concluded that the nails used to connect the joists to the top plate were not structurally adequate to handle the resulting wind loads. In one section of the house, this conclusion required the assumption that windows bad broken, causing a "partial enclosure" that increased interior pressure. In another section, the nails were inadequate even without a partial enclosure. (Doc. 140, Exhibit 17). Sealy also noted that the nails attaching the top plate and the studs were not bent when the two separated, a condition suggestive of the roof being uplifted by wind rather than the wall being pushed inward by water (which would tend to bend the nails). (Sealy Deposition at 144-45). This evidence is plainly sufficient to call into question the inference created by Fisher's affidavit and thereby defeat Lexington's motion for summary judgment.

Lexington challenges the efficacy of Sealy's opinions in the following respects: (1) failure to identify the damage attributable to wind; (2) failure to state that the wind definitely lifted the roof from the walls, causing them to be unstable; (3) reliance on a gust

calculation of 85 m.p.h., even though it is theoretically possible the house experienced just one gust that strong; (4) reliance on AcccuWeather figures instead of some lower figure to account for AccuWeather's margin of error; (5) failure to include in his calculations a load duration factor of 1.6; (6) improper assumption of a partial enclosure; and (7) failure to determine whether flood water could have damaged the house. (Doc. 145 at 13-16).

These objections are easily answered by reference to the parties' relative burdens. Because it is Lexington's burden at trial to establish that all of the damage it did not pay for was excluded water damage, the plaintiffs' only burden on motion for summary judgment is to provide evidence sufficient to call into question Lexington's minimization of wind damage.

Lexington's third, fourth, fifth and sixth objections are thus immaterial because they go at most to the weight to be afforded Sealy's opinions concerning the cause of the walls' collapse. Indeed, they do not go very far even in that direction. With respect to the third objection, Lexington concedes the house experienced at least one 85-m.p.h. gust, points to no evidence suggesting it is likely that only one such gust occurred, and points to no evidence that one such gust would be insufficient to separate the roof. With respect to the fourth objection, Lexington concedes that the AccuWeather figures Sealy used are reliable, but simply prefers that Sealy utilize some lower, possible figure that would be more favorable to Lexington. With respect to the fifth objection, a jury could of course find that utilization of a 1.6 load duration factor was not required. At any rate, Sealy's calculations reflect that, even using a 1.6 load dura-

tion factor, the force applied would still exceed the capacity of the nails in some areas. (Doc. 145, Exhibit 17 at 8; Fisher Deposition at 128-29). The sixth objection is based on the testimony of Fisher, who says only that he personally Docs not know one way or the other whether blown-out windows would result in a partial enclosure. (*Id.* at 125-26).

Lexington's first and seventh objections proceed from, and depend upon, the false premise that the burden is on the plaintiffs to establish the line of demarcation between flood damage and wind damage. On the contrary, on motion for summary judgment the plaintiffs need only bring into question the line drawn by Lexington.

Finally, Lexington complains that Sealy's report opined only that it was "mathematically possible" for the roof to have separated from the walls due to wind loads, so that the wind "could have" caused "a portion" of the damage to the walls that required demolition. (Doc. 140, Exhibit 17 at 2). Since all the plaintiffs need do at this juncture is draw Lexington's conclusion into question, the quoted language may well be sufficient to meet their burden. The question is moot, however, since Sealy in deposition made clear that, given his calculations; the "mathematical possibility" that the roof separated due to wind loads was 100%. (Sealy Deposition at 135-37).

In summary, Lexington is not entitled to summary judgment with respect to its determination that the damage resulting from wind did not exceed $64,167.86.

II. Bad Faith.

The amended complaint alleged that Lexington is liable for bad faith due to violations of two Louisiana

statutes. (Doc. 60 at 15-16). After Lexington filed a motion for summary judgment explaining how it could not have violated those statutes, (Doc. 105 at 17-22), the plaintiffs abandoned all reliance on Louisiana law, arguing instead that Lexington is liable for bad faith under Alabama law. (Doc. 140 at 22-25). Lexington does not object to the plaintiffs' substitution, (Doc. 145 at 16), so the Court addresses their Alabama argument.

Alabama recognizes two broad forms of the tort of bad faith: the "normal" or "ordinary" case and the "abnormal" or "extraordinary" one. *E.g., Acceptance Insurance Co. v. Brown*, 832 So. 2d 1, 15-16 (Ala. 2001); *Employees' Benefit Association v. Grissett*, 732 So. 2d 968, 976 (Ala. 1998). The plaintiffs allege both forms of the tort (Doc. 140 at 24).

Certain elements are common to both the ordinary and the extraordinary forms of bad faith: (1) the existence of an insurance contract between the parties; (2) an intentional refusal to pay the insured's claim; and (3) the insured's contractual entitlement to payment of the claim. *State Farm Fire & Casualty v. Slade*, 747 So. 2d 291, 304, 316-18 (Ala. 1999). Beyond this point, the elements diverge.

In the ordinary case, the insured must show "the absence of any reasonably legitimate or arguable reason for that refusal (the absence of a debatable reason)." *Blackburn v. Fidelity & Deposit Co.*, 661 So. 2d 661, 667 (Ala. 1995) (internal quotes omitted). A debatable or arguable reason is "a reason that is open to dispute or question." *Koch v. State Farm Fire & Casualty Co.*, 565 So. 2d 226, 229 n.4 (Ala. 1990). "When a claim is 'fairly debatable,' the insurer is entitled to debate it, whether the debate concerns a matter of fact or law." *Davis v. Cotton States Mutual*

Insurance Co., 604 So. 2d 354, 358-59 (Ala. 1992) (internal quotes omitted). The burden on the plaintiff arguing the absence of a debatable reason is so great that, "in the 'normal' case, a plaintiff's bad-faith claim may not be submitted to the jury unless she shows that she is entitled to a directed verdict on the contract claim." *Alfa Mutual Fire Insurance Co. v. Thomas*, 738 So. 2d 815, 822 (Ala. 1999).

The extraordinary case is premised on "countervailing policy considerations that weigh) in favor of the insured's right to have his claim properly evaluated and promptly paid," *Brown*, 832 So. 2d at 16 (internal quotes omitted), which would not be upheld were the insurer always able to escape liability by showing a debatable reason for its denial. Thus, "[t]he rule in [extraordinary] cases dispensed with the predicate of a preverdict JML [judgment as a matter of law] for the plaintiff on the contract claim if the insurer had recklessly or intentionally failed to properly investigate a claim or to subject the results of its investigation to a cognitive evaluation." *Id.* (internal quotes omitted).

The key issue in the ordinary bad faith case is whether, when the claim was denied, the insurer possessed a debatable reason for the denial The plaintiffs identify the date of denial as March 3, 2006, (Doc. 135 at 2 & Exhibit 13), but they do not address the insurer's debatable reason. Lexington's February 8, 2006 unconditional tender of $53,135.96 was based on the recommendation of its independent adjuster, who made the recommendation after an on-site investigation which concluded that, while wind damaged the roof, the walls' collapse was caused by flood. (Doc. 145, Exhibits 33, 35). The adjuster's investigation, opinion and recommendation provided Lexington a

debatable reason for refusing to pay any more on the claim, and in view of it the plaintiffs could not obtain judgment as a matter of law on their contract claim; indeed, they do riot suggest that they could. Accordingly, their "ordinary" bad faith claim fails as a matter of law.

The plaintiffs argue that they can establish an "extraordinary" bad faith claim because Lexington did not begin to investigate the claim until after they filed suit (on March 8, 2006). (Doc. 140 at 25). As discussed above, however, Lexington's independent adjuster completed an investigation prior to Lexington's denial of the claim and the plaintiffs' institution of this action. The plaintiffs have not articulated how the adjuster's investigation, or Lexington's reliance on it, constitutes a failure to investigate for purposes of Alabama's bad faith law. What the plaintiffs do manage is a laundry list of perceived imperfections and anomalies in Lexington's handling of their claim, none of which do they tie to an actionable failure to investigate the claim, (Doc. 140 at 22-24). The Court will not attempt to do so on their behalf.

In summary, Lexington is entitled to summary judgment with respect to the plaintiffs' bad faith claim.

III. Liability for Acts and Omissions of T&B and Ladd.

The plaintiffs argue that T&B and Ladd were Lexington's agents, such that Alabama law imposes vicarious liability an Lexington for their wrongdoing under the doctrine of respondeat superior. (Doc. 140 at 25-30). As discussed in the Court's order addressing the motion for summary judgment filed by T&B and Ladd, they cannot be liable to the plaintiffs

because the applicable limitations period expired before the plaintiffs filed suit. That rating precludes the plaintiffs' derivative claim against Lexington for two reasons.

First, "on a claim against an agent, and against the principal solely on the theory of respondeat superior, a verdict in favor of the agent works an automatic acquittal of the principal . . . ." *Stevenson v. Precision Standard, Inc.*, 762 So. 2d 820, 827 (Ma. 1999). Thus, "if all tort claims against an agent are dismissed with prejudice, then a subsequent tart claim based on the same facts will not lie against the agent's principal" unless the patties agreed to the contrary. *Hundley v. J.F. Spann Timber Co.*, 2007 WL 80828 at *5 (Ala. 2007). Without a viable claim against the agent, there can be no recovery against the principal under the respondeat superior theory on which the plaintiffs are traveling.

Second, the ruling in favor of T&B and Ladd was based on Louisiana's peremptive period for suits against insurance brokers and other Louisiana licensees far claims arising out of an engagement to provide insurance services. La. Rev. Stat. § 5606. Ladd holds such a license, triggering the statute, and the Court found all its other requirements satisfied. Although Lexington apparently Docs not hold a Louisiana license, [b]ecause the acts of an insurance agent are generally imputable to the insurer he represents, we conclude La. R.S. 9:5606's peremptive periods apply to the claims against the insurer]." *Klein v. American Life & Casualty Co.*, 858 So. 2d 527, 531 (La. Ct. App. 1st Cir. 2003); *accord Kobeszko v State Farm Fire & Casualty Co.*, 2007 WL 1486315 at *1 (E.D. La. 2007). Likewise, because the plaintiffs seek to impute the conduct of T&B and Ladd to

Lexington, the peremptive period applies to their claim against Lexington. As discussed in the Court's order granting the motion for summary judgment of T&B and Ladd, Section 5606 bars the plaintiffs' action, and the same ruling necessarily applies to the derivative claim against Lexington.

In summary, Lexington is entitled to summary judgment with respect to the plaintiffs' claim of vicarious liability.

IV. Declaratory Relief.

The amended complaint lists it declarations the plaintiffs would like the Court to make dealing with coverage. (Doc. 60 at 11-13, ¶ 37). The Court's rulings above dispose almost of them. In particular, the relief requested in subparagraphs C, G, H, I, J, K, L and M cannot be granted in light of the rulings herein. The relief requested in subparagraphs A, B and F remains in this action only to the extent it seeks declarations as to the extent of damage caused by wind rather than flood.[9]

V. Negligent/Wanton Training and Supervision.

Lexington did not address this claim in its motion for summary judgment and thus failed to meet its initial burden.

VI. Plaintiffs' Motion for Partial Summary Judgment.

The plaintiffs' motion addresses only whether T&B and Ladd are Lexington's agents for purposes of imposing vicarious liability on Lexington for their misconduct. Because, as discussed in Part III, Lexington cannot be vicariously liable regardless of

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[9] Subparagraph C is directed to T&B and Ladd. There is no subparagraph E.

whether T&B and Ladd are its agents, the plaintiffs' motion is moot.

CONCLUSION

For the reasons set forth above, Lexington's motion for summary judgment is granted with respect to the plaintiffs' breach of contract claim that the Policy covers all or any portion of loss from flooding; granted with respect to the plaintiffs claims for bad faith and vicarious liability; and granted with respect to the declaratory relief sought in paragraph 37 of the amended complaint, subparagraphs C, G, H, I, J, K, L and M. In all other respects, the motion for summary judgment is denied. The plaintiffs' motion for partial summary judgment is denied as moot.

DONE and ORDERED this 20th day of June, 2007.

/s/ William H. Steele
WILLIAM H. STEELE
United States District Judge

APPENDIX P

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil No.: 06-0360-WS

RICHARD PREIS and VICTORIA HEARIN PREIS,
Plaintiffs,

vs.

LEXINGTON INSURANCE COMPANY,
Defendant,

August 13, 2007
Courtroom 2a
U.S. Federal Courthouse
Mobile, Alabama

VOLUME I

JURY TRIAL PROCEEDINGS

Before The Hon. William H. Steele
United States District Judge

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[25] First of all, the Lexington policy only covers wind damage. It does not cover damage from flood. It does not cover damage from storm surge. It does not cover damage from materials that are brought in, carried in by the water with the storm surge that might destroy a house.

It's also not disputed that Mr. Preis had flood insurance on his property. He not only had the one that you can buy from the Federal—that's subsidized by the Federal Government, which provides $250,000 worth of damage for the building for flood loss to the building and a hundred thousand dollars for damage to contents; he also purchased and knew to purchase an excess flood insurance, more flood insurance on top of what the Federal Government allows. And that excess flood insurance that he has was, I believe it's either a hundred or a hundred fifty thousand dollars on the structure itself, another $50,000 for contents. He also had a separate flood insurance policy on the guest house.

Now, you'll hear during the course of this trial that in addition to the main structure, there was a guest house, although actually before the storm, this was more of a storage shed that Mr. Preis used. And he bought a separate flood policy for this storage shed or guest house that had coverage of $45,800 for the structure itself and $7,500 in contents.

You will also learn that he made claims on these flood policies and that he collected full policy limits for flood [26] damage because what we believe the evidence will show is that his house was destroyed by flood and storm surge and not by wind. Now, if you add it all up, I think it comes close to or maybe exceeds $600,000 that he has collected for the—from the flood carriers.

The main issue that we have to decide in this case, or you'll have to decide in this case, is how much damage was done by wind, whether the wind destroyed the two walls that Ms. Milam referred to, or whether those walls were destroyed by storm surge.

It is Lexington's position that there was very little damage to the property due to wind. There was some roof damage and there was some damage to the interior of, I think, the upstairs bedrooms because rainwater got in, and that type of water, rainwater that comes in an opening, is covered by the Lexington policy.

Now, you'll also hear that those items, repairing everything in this house, was included within the flood adjustment. The flood adjustors who came in, they paid to repair and replace the entire roof. So, everything he's claiming in this case against Lexington was claimed and paid for by the flood insurance companies.

We believe that the Lexington policy, what is the covered wind damage under the Lexington policy, after applying—he had about a $20,000 deductible on that policy—after

* * *

[33] and those timbers got pushed by the storm surge into his house, and we believe destroyed the south wall that was destroyed.

And look at this photograph (indicating), sitting out in Mobile Bay, exposed to the wind, clearly exposed to the wind, nothing protecting it. Not a shingle is missing from the roof, and look at the weather vane. The weather vane is still there. If there was enough wind force to destroy walls in his home, that weather vane would probably be about four counties over.

Now, Van Fisher, our expert, will explain how the physical evidence from his inspection and from the photographs that have been made available fit the

classical pattern of storm surge damage, and this is what we believe happened.

Now, I've told you that Mr. Preis has already collected somewhere between five and $600,000 for flooding and storm surge damage. You will hear that Lexington adjusted this loss in a manner very favorable to Mr. Preis, and we included things that we don't owe. We tendered to him 65,000, $64,000 plus, including things that we didn't owe, and we did it to give him the benefit of the doubt. Any time we saw a gray area, anything that could possibly, to avoid an argument, we agreed to pay it. And we did it in what's called an unconditional tender. He could have taken that money, cashed that check, and he would still be entitled to brim this [34] lawsuit.

Well, they never cashed the checks. They returned them to us. And if you add the $65,000 to the approximate $600,000 that he's gotten because of the flooding, you know, that exceeds the amount of insurance he had with Lexington to the dwelling.

And the dwelling insurance, Ms. Milam showed you the chart, and those were all correct, but the dwelling, the Coverage A was $634,000. Now, I mean, that's a little bit apples and oranges, and I understand that because there are other coverages under a policy, but I'm just pointing that out to you for illustrative purposes.

Now, Mr. Preis could have purchased more flood insurance. He knew to purchase excess flood insurance, but he chose not to do so. And what we think this case is about is that he just did not have enough flood insurance to—he claims that it's going to cost him a million dollars to repair his home, which will be in dispute, but he just didn't have enough flood insurance.

And ladies and gentlemen, on behalf of Lexington Insurance Company, again, we thank you and we ask that you listen carefully to the evidence and all of the evidence. And since they get to go first, don't make your mind up until after you've heard all the evidence and hear from my witnesses as well.

* * *

[60] Exhibit 38?

MR. PREIS: Yes, sir.

THE COURT: Okay. That was not listed this morning. Is that another exhibit that's jointly proposed?

(Brief pause.)

MR. SIEGEL: Your Honor, it wasn't listed because Counsel had indicated he had an objection. I assume he's withdrawing his objection.

MR. PREIS: Withdraw the objection based upon the Court's previous ruling, Your Honor.

THE COURT: All right. 38 is admitted as well then. Thank you.

(Joint Exhibit Number 38 was received in evidence.)

BY MR. PREIS:

Q. Mr. Preis, now what is this?

A. What happened was the Hartford people, the flood insurance people, not AIG Lexington, but the Hartford people wanted to settle with us. So, they sent me this statement or affidavit or whatever you'd like to call it. And I really didn't understand it, but it was very, it was very unclear to me, and I was hesitant to sign it.

So, what I did was I attached an amendment and signed it and basically told them that if we accepted

the water settlement from Hartford, not from AIG Lexinaton, that this

* * *

[87] were asked, starting on line eight: "How much money were you paid on your claims as a result of this incident with the hurricane? Answer: I don't remember. Question: And you were satisfied with the way your claim was—were adjusted? Answer: For the most part, yes. Question: What part weren't you—you not satisfied with? Answer: Well, you always want more."

That was your testimony in January of 2006; is that correct?

A. That is correct.

Q. I'm sorry?

A. That is correct.

Q. And then again on line 22: "And that you always want more money?" Your answer is: "That's correct." That was your testimony in January of 2006?

A. That is correct.

Q. And that was the truth?

A. That is correct.

Q. Now, you did have two flood insurance policies on the main house; isn't that right?

A. Yes. I believe one on the main house and one on the storage shed that used to be a bedroom, but it was storage, yes, sir.

Q. On the main house, you had a primary flood policy through Hartford subsidized by the Federal Government that provided [88] limits of $250,000 for the structure and a hundred thousand dollars for contents; is that correct?

A. Yes, sir. I think those numbers are accurate.

Q. And then you also purchased an excess flood

insurance policy with limits, I think, of a hundred fifty thousand dollars for the dwelling and $50,000 for contents?

A. I think that's accurate, yes, sir.

Q. Okay. So, you had $400,000 of flood—of flood policy limits for the dwelling of the main house and a hundred fifty thousand dollars worth of contents coverage for flood losses, adding the two together?

A. Total being what, I'm sorry?

Q. 400 for the dwelling.

A. Okay.

Q. And a hundred fifty for contents.

A. I believe that number is correct.

Q. And you also had a separate flood policy on the storage shed or the guest house that provided $48,750 in coverage for the structure and $7,500 for the contents in the guest house?

A. Yes, sir. I believe that's correct. That's close.

Q. And you collected all of that money as a result of the flooding and storm surge that happened to your house in Hurricane Katrina; isn't that correct?

A. If I understand your question, I think we answered that in the amendment. When I received the flood money, we were [89] very specific to say that that was the water that came after the wind. We went over that amendment, that addendum earlier this morning.

Q. Maybe I didn't make my question clear. I'm just trying to establish that you submitted all of those damages to your flood insurers, and you were paid all of the policy limits on your flood insurance policies; isn't that correct?

A. You're referring to the Hartford?

Q. The Hartford and the excess flood policy—

A. Yes, sir.

Q. —and the separate policy—

A. Yes. I was very satisfied with Hartford Insurance, what they paid and how timely they paid it, that is correct.

Q. The answer to my question is, you were paid full policy limits for flood?

A. That's correct.

Q. And then you were also paid by FEMA $30,000 to demolish the house; isn't that right?

A. I don't know if it was FEMA, but there was some payment for the demolishment, yes, sir.

Q. Okay. Now, are you aware that that payment for the demolishment of your house can only be submitted for flood losses?

A. No, sir, I wasn't aware of that.

Q. So, if we add all that up and it adds up to about [90] $600,000, that's what you've collected from either FEMA or the flood insurers?

A. The number that I've been working off of is 450 to 500, but it's in that vicinity, yes, sir.

Q. Whatever it adds up to?

A. Right.

Q. Now, you made the decisions on how much insurance to buy for your home; isn't that correct?

A. That's incorrect. I applied for insurance. Jamie Batre Insurance (sic) issued that amount.

Q. Okay. Now, you—but the flood policies you didn't buy from Thames Batre. You bought your flood policies from your agent in Baton Rouge, Wright and Percy; isn't that right?

A. That is correct. We never could figure out why James Batre (sic) didn't offer the excess flood when I purchased the original policy from them, and we still don't know that answer today. I'd have purchased it from them.

Q. Let's get a few things clear here. The flood policies that you had on the Point Clear property, you

bought those flood policies, the three flood policies we've talked about, you bought those from your agent in Baton Rouge, right?

A. That is correct.

Q. Okay. And you could have bought more, couldn't you?

A. That's what I was offered. I don't know if there was a maximum or not. Whatever they offered me is what I purchased.

* * *

[93] A. In this lawsuit?

Q. Yes, sir.

A. No, sir.

MR. PREIS: No further questions, Your Honor.

THE COURT: All right. You can step down. Thank you.

THE WITNESS: Thank you, Judge.

THE COURT: Next witness?

MS. MILAM: Your Honor, we'd like to call Bill Purvis to the stand.

THE COURT: All right. Come on up, Mr. Purvis. Get you to come up here.

(Brief pause.)

THE COURT: Let me get you to step right around here, if you would, please, sir. If you will raise your right hand and take an oath.

BILL PURVIS,
having first been sworn, testified as follows:

THE COURT: All right. You can have a seat (indicating).

DIRECT EXAMINATION

BY MS. MILAM:

Q. Sir, will you please state your name.
A. Bill Purvis.

THE COURT: Mr. Purvis, let me get you to pull that [94] microphone down a little bit and maybe lean into it just a bit.

(Witness complies.)

THE COURT: Thank you, sir.

BY MS. MILAM:

Q. Mr. Purvis, where do you reside?
A. Spanish Fort, Alabama.
Q. And will you please tell the jury what you do for a living?
A. I'm a custom home builder.
Q. And how long have you been a home builder?
A. Pretty soon, it will be 40 years.
Q. Where do you mainly build houses?
A. Mostly on the Eastern Shore, Fairhope, Point Clear and Daphne, Montrose.
Q. And do you only build homes? Do you build commercial sites?
A. Basically, just build homes.
Q. Will you just briefly describe for the jury what your business entails?
A. I design and build residential homes.
Q. And when you say design, what do you mean?
A. That means I do the plan work. I do the whole job.
Q. So, you actually draw the blueprint out?
A. Right. yes.
[95] Q. And go through the entire process of building the home; is that correct?

A. Yes, yes.

Q. Will you please state for the jury what your professional licenses are that you hold?

A. I hold a license as a residential builder—as a general contractor. Sorry.

Q. And is that license good today?

A. Yes.

Q. Have you over had any complaints against you or any reports to the State licensing board?

A. No.

Q. Do you have firsthand knowledge of the Preis property located at 15039 Scenic Route—or I'm sorry, 49 Scenic 98 in Point Clear, Alabama?

A. Yes, I do.

Q. And what is your personal knowledge of that property?

A. I don't know for exactly how long I've been working down there. I would say a number, ten years or better. And I've done several additions and remodeling projects to that place.

Q. And are you referring to the home—if I could get Exhibit 1. Are you referring to the home that you see on the screen in front of you, Mr. Purvis?

A. Yes.

Q. And is that the way the home looked prior to the storm?

[96] A. That's right.

Q. And will you just briefly describe the type of work that you have done to that home over the ten or so years that you—

A. Well, the first time we worked there, as a matter of fact, nobody can see these doors, but we replaced all them and rebuilt custom doors for the exterior of the house. We remodeled the kitchen at that time, remodeled the porch. We installed some marble floors; probably did some roofing at that time.

Just basically, we started working on the house and just, you know, as time went on, they kept doing more and more to the house.

Q. So, on—I mean, just on average, how many times do you think you were in and out of that house over the years that you worked on it?

A. Oh, I'd be safe to say three or 400 times, probably.

Q. So, is it fair to say that you are very familiar with the design, the contents of the interior of the house?

A. Very much so.

Q. Will you just briefly describe for the jury the finishes inside the house?

A. Like I said a while ago, the floors in the kitchen, dining area, and living room and the porch were marble. Countertops were marble. The kitchen cabinets were walnut—not walnut, mahogany. I think I said all the countertops in [97] the kitchen were granite or marble. And the appliances were all upscale appliances. I don't know if you care for me to name off the brand names, but they all were real expensive.

Q. What about the finishes on the walls?

A. Wall finishes, there was a lot of wood paneling in different parts of the house, some of the old parts of the house and some of the parts that we re-did. There was a lot of wood paneling in the walls, wood ceilings.

Q. Is it fair to say—or Mr. Purvis, would you please compare to the jury the difference between the value of those finishes as opposed to a normal home? And I mean higher or lower. You don't have to give me a certain dollar amount.

A. Okay. In an average home that would be built, I'd say with an eight-foot ceiling, the finishes in it

would all be, you know, say, sheetrock, carpet, vinyl floors, and things like that.

In this home, it's just hard to kind of really describe it. Everything was kind of unusual. A lot of—in fact, it had some brick walls inside the house too. It had two fireplaces, I think, in the house.

As far as cost, is that what you're asking me or what?

Q. Would it be higher or lower than the cost of an average house?

A. Be quite a bit higher.

Q. Did it have any craftsmanship that set the house apart [98] from your average house?

A. Well, I think so. The work that we did there, all the cabinetry, you know, is custom made and custom designed. I designed it all myself. A lot of the wood was just, the way we installed it was unusual. And these doors that I mentioned, they were all built out of mahogany. And there was, you know, sort of a little special touch to everything that we did there.

Q. What about the windows or doors in the house? In this picture, we see that that one wall is windows or doors. Is there anything special about the windows or doors in the house?

A. Well, those doors, or the doors that we built, the windows that you see at the end of the house are casement windows which are real expensive.

Q. How many square feet was in the house?

A. You know, it's a guess for me, but I've always sort of used a figure of—

MR. SIEGEL: Your Honor, I object if he's going to guess.

THE COURT: Sustained.

BY MS. MILAM:

Q. Mr. Purvis, do you know how many square feet were in the house?

A. Not exactly. An estimate would be around 5,500 square [99] feet.

Q. What is your estimate of the square footage of the house based on your personal knowledge of the house?

A. Dollar-wise you're talking about?

Q. No. What is your estimate of the square foot of the house based on you being inside the house?

A. That's what I'm asking. Are you asking me how much per square foot?

Q. No, just the amount of square feet.

A. Okay. 5,500 feet is what I would estimate.

Q. Okay. And of the 5,500 feet, how many feet of that would you consider conditioned or indoor feet?

A. I consider the whole 5,500 feet.

Q. Were there any porches or—screened-in porches or anything on the outside of the house?

A. Yes. A screened-in porch on the bay side of the house, and a large covered patio, and then the entrance, main entrance to the house was covered.

Q. Is there a difference in the value of a square foot conditioned and a square foot, what we refer to as unconditioned or a porch area?

A. Normally, there is. And one thing, and this is to consider too, that screened porch also had a marble floor on it.

Q. Okay. And do you have personal knowledge of the size of [100] the guest house?

A. The old guest house?

Q. Yes, sir.

A. I can't remember that figure for sure. I would say somewhere around 250 square feet.

Q. And Mr. Purvis, I'm going to show you an exhibit that has been previously offered to the Court, and it's on the screen in front of you (indicating).

A. Okay.

MR. GORDON: That's Exhibit 19, Your Honor.

THE COURT: 19?

MR. GORDON: Yes, sir.

THE COURT: Okay. Thank you.

BY MS. MILAM:

Q. Thank you. Will you please—is this your letter, Mr. Purvis (indicating)?

A. Yes, it is.

Q. And when did you write this letter?

A. I don't see a date there, but it would have been fairly shortly after the Hurricane Katrina hit.

Q. If you will look, and I'll circle up here at the top (indicating).

A. Okay. I see it now. January 19th, 2006.

Q. Okay. And what did you estimate the square footage of the first floor at in this letter?

[101] A. You know, I'm going to have to use memory, but I'm going to say somewhere between 250 and 200—$300 a square foot.

Q. Okay. If you will, Mr. Purvis, look down here. I'm going to circle this box right here (indicating).

A. Yes.

Q. Okay. We're just talking about the space right now. So, will you—how many square foot did you estimate the first floor to be?

A. 4,200.

Q. Okay. And then you additionally had some screened-in porch and covered porch areas; is that correct?

A. That's right.

Q. And then on the second floor, how many square feet were there?

A. 1,100.

Q. And then in the guest house?

A. 280.

Q. And are these numbers accurate to the best of your ability to testify to them?

A. That's right.

Q. And Mr. Purvis, was the house demolished that was standing there after Katrina?

A. Yes. In my opinion, the house was beyond repair.

Q. Okay. And was it ultimately demolished by a demolition crew?

[102] MR. SIEGEL: Your Honor, I move to strike that last answer. He's not been tendered as an expert and to give opinions about whether the house was beyond repair.

THE COURT: Well, yeah, I think he misunderstood the question too. So, I'll grant your motion, and the answer is stricken. Rephrase your question.

BY MS. MILAM:

Q. Mr. Purvis, my question was just whether or not the house had been removed from the site?

A. Oh, no, it hadn't been removed the first time I saw it.

Q. Okay. And do you know why it was demolished?

A. After the Fairhope Building Department looked at it and they condemned it, and—

MR. SIEGEL: And I object now as hearsay.

THE COURT: Sustained.

BY MS. MILAM:

Q. In your opinion, would it have been possible to raise the main house to meet the current codes?

A. You know, I'd say anything is possible. But the cost to raise it would have been way beyond what it would cost to take it down and build it over.

Q. And how much was the house worth in August 2005, in your opinion?

MR. SIEGEL: Your Honor, I object. The value of the house? He's not a real estate appraiser.

[103] THE COURT: Sustained.

BY MS. MILAM:

Q. Mr. Purvis, how much would it cost to rebuild the Preis home after it was destroyed by Hurricane Katrina, in your opinion?

A. It would be a little over a million dollars.

Q. And what is your figure based on?

A. My figure there was based on demolition and—now, are you asking me, again, how much a square foot or—

Q. And what is your estimate of how much a square foot it would cost to rebuild Mr. Preis' house?

A. Somewhere between 250 and $300 a square foot.

Q. Have building costs increased since you wrote this letter?

A. Yes, I'm sure they have.

Q. By about how much?

A. My educated guess would be somewhere around 20, 25—

MR. SIEGEL: Your Honor, I object to this question because the basis of recovery in relation to the policy is at the time of the loss and not as of today.

THE COURT: Overruled.

BY MS. MILAM:

Q. Go ahead and answer the question, Mr. Purvis.

A. I would say about 20 to 25 percent.

Q. And that's since Katrina hit; is that correct?

[104] A. Yes.

Q. Or is it since this letter was written?

A. Well, the letter was only written a few months after Katrina.

Q. So, is it your testimony that the building costs rose after you wrote this letter?

A. Right. That's right.

Q. And did you break on your estimate by finished space and unfinished space?

A. Not really. What I have here, I have it broken down into, you know, conditioned areas, screened porch, covered patio, and the upstairs conditioned area, and the guest house conditioned area and storage space.

Q. Okay. Mr. Purvis, let me ask you this question: When you came up with the total cost to rebuild a little over a million dollars, did you valuate the conditioned square footage and the unconditioned square footage at a different price per square foot?

A. Yes.

Q. Can you please tell me what—how you broke that down?

A. Okay. Now, without having my notes, I can't tell you exactly, but at 250 to $300, I probably used .a number of 250 for the enclosed area. The second floor would have been a little bit less expensive. The screened porches and patios, screened covered porches were probably around a hundred and [105] twenty-five. And I would say the second floor area

was probably around a hundred and fifty to 200. Like I say, I don't have my notes here with me.

Q. And you came up with a total of a little over a million dollars for all of those amounts; is that correct?

A. That's right.

Q. Has there been any rebuilding on the Preis property since the original house was demolished?

A. Yes. I built a guest cottage.

Q. Can you just give me an idea of the size of that?

A. It has approximately 1,300 square feet of living area, 1,200 square feet of unfinished or garage area below, with an office space below, I think, is around a hundred square feet. Utility below is around a hundred square feet.

Q. And is that house built to current code?

A. Yes, it is.

Q. And about how far is—how high is that house off the ground?

A. I think the main floor is 17 feet.

Q. And can you tell me what the elevation of that spot is, please?

A. Its plus or minus eight feet.

Q. And that—when we're talking about plus or minus eight feet, you are referring to sea level; is that correct?

A. That's right.

[106] Q. How much extra cost is involved in building the foundation of a house according to the current code of height requirement?

A. Well, the code hadn't changed since Katrina, and we did put extra foundation into this guest house. So, we put pilings down prior to pouring the footings and put slab on top of all that, connected all the foundation together.

Q. So, Mr. Purvis, if you will, could you tell me what the approximate cost of putting that type of foundation on the Preis home, which was 4,200 square feet plus porches, would be?

A. Well, if I remember correctly, it cost around $60,000 to do the foundation and first floor, which the first floor I'm calling the garage, office, and utility, unfinished area, screened porch.

Q. Okay. Now, are you talking about the guest house that you built or—

A. Right.

Q. Okay. What about if hypothetically we rebuilt that same foundation on the 4,200 square foot footprint of the old house?

A. Are you talking about building a foundation and building a new house there?

Q. Yes, sir. Like if we were rebuilding the old house but at the current code, would the requirement of the foundation [107] be more expensive?

A. Yes.

Q. And do you know about how much it would cost you to rebuild that 4,200 square feet at 14 feet above sea level, or whatever the code requires? I believe it's 12 or 14 feet; is that correct?

A. 12 feet is the requirement. Now, I'm not sure what you're asking me. If you are asking me the 4,200 square feet of conditioned area only?

Q. Well, let me rephrase my question and make sure that I can get you to understand.

A. All right.

Q. If we were rebuilding the entire first floor of the old house, 4,200 plus 280 plus 560, which I believe you testified earlier was a little over 5,000 feet; is that correct?

A. Are you including the 1,100 square feet of second floor, is it included in that 55?

Q. Okay. Yes, sir. And my question to you is: How much extra cost is involved in building the foundation of that size house according to current code requirements?

A. It's really hard for me to make a guess at that.

Q. Do you have any estimation?

A. You know, it's really—

MR. SIEGEL: Your Honor, he just said he couldn't do [108] it.

THE COURT: Sustained.

BY MS. MILAM:

Q. Do you know if the old part of the Preis home had hurricane straps or not?

A. I think maybe the addition to the house, which that 1,100 square feet upstairs would be above that, probably did have, but the existing—the original part of the house probably did not have.

Q. I'm going to show you a map of the house (indicating). Will you just point to—you can make—actually touch that screen and make circles on it. Will you just point to me where the hurricane strapping was present?

A. I'm thinking right in here (indicating).

Q. And that's the only part of the house that you are aware of that had hurricane strapping; is that correct?

A. Well, the reason I'm saying that is because that's a fairly new addition, and the old part of the house was built prior to building codes.

Q. Do you know about how old that older part of the structure was?

A. I'm not sure. I know it's pretty old.

Q. Now, if you would, please, point on this map to the areas of the home that you had worked on and had some renovations done to them.

A. (Witness complies.)

[109] Q. So, Mr. Purvis, is it fair to say that most of the house had been updated or had renovations to it?

A. Right. We—some of the things that we did, you know, we built new cabinets, maybe replaced some wall, maybe fixed a ceiling or something, but I've basically done some work in every part of that house.

MS. MILAM: Just one moment.

(Brief pause.)

MS. MILAM: Your Honor, that's all the questions I have for Mr. Purvis.

THE COURT: All right. Mr. Siegel?

MR. SIEGEL: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. SIEGEL:

Q. Good morning, Mr. Purvis. How are you?

A. Good morning. Fine. Thank you.

Q. Let me just start with the questions about hurricane straps. And you said that you think the addition probably had hurricane straps and the original part probably did not?

A. That's right.

Q. Do I understand you are making that assumption based upon when those structures were built?

A. That's right.

Q. You're not making that—you're not making that testimony based upon any personal observation that you made, [110] are you?

A. That's right.

Q. Okay. So, you never saw hurricane straps anywhere in this house, did you?

A. No, I didn't.

Q. You didn't look for them?

A. No.

Q. So, it is possible that there were hurricane straps throughout the house, or it's possible there were no hurricane straps?

A. That's possible.

Q. Now, I think you testified that you rebuilt the guest cottage?

A. We built a new guest cottage.

Q. Right. It didn't bear any resemblance to the original guest house that was there, did it?

A. No.

Q. The original guest house was about 280 square feet, and the new one, including porches and garages, is about 2,800 square foot?

A. As such.

Q. Now, how much did you charge to rebuild the guest house?

A. I don't know for sure.

Q. Was it based upon that 250? You think he spent 250, $300 a foot?

[111] A. I can't say for sure. We do all of our work on a cost plus basis, and we didn't, we didn't contract the job by the square footage. But I would assume, oh, I'm reasonably sure the house cost more than $300 a foot.

Q. Okay. And you're talking about heated and cooled spaces there. Let's make sure that we're saying this right.

A. No, we're not. There's no way to really break it apart and say that the second floor cost 300, the bottom floor cost a hundred. When you do a job like I do, I build a house, you know, once a month, and they pay me once a month. But you just, you just assume and know pretty much the second floor costs a lot

more than the first floor because of the first floor being what it was.

Q. I'm trying to get an overall average or an overall cost. Are you saying overall on the average, 2,800 square feet of home cost $300 a foot?

A. I can't say that.

Q. Okay. Did you build that home to the quality of finishes that you included in your estimate to rebuild everything?

A. Right.

Q. You did?

A. I did.

Q. Okay. And you filled out the permit applications to rebuild that guest home, did you not?

A. Yes, I did.

[112] MS. MILAM: Your Honor, we'd like to object. The documents that Mr. Siegel—

THE REPORTER: I'm sorry, can't hear you.

THE COURT: Turn your microphone on, will you, please.

(Brief pause.)

(Sidebar conference, on the record:)

MS. MILAM: Your Honor—well, go ahead and, I guess, submit what you are going to—

MR. SIEGEL: Well, Judge, I'm not going to ask him about any documents just yet. I'm going to ask him of what he stated on a permit application to build the guest house. And this is impeachment because he told the City of Fairhope it was going to be a hundred and forty thousand dollars to build the guest house.

MR. PREIS: The testimony of that witness is that Mr. Purvis did not tell him. And go get the deposition

if you want to look at it. But the bigger issue is this document has never been put into evidence. It was done in connection with the trial deposition. And it was discovery that was obtained after the cutoff and under the premise of doing a trial deposition. But what he did was was went out and subpoenaed documents that were outside the discovery time period.

But the real issue of the thing, Judge, is if you look at his deposition, the witness testified that Mr. Sealy never [113] told him that.

MS. MILAM: Mr. Purvis.

MR. PREIS: I mean, Mr. Purvis.

MR. SIEGEL: This is Mr. Purvis, Your Honor. This is impeachment. I didn't subpoena any documents when we were preparing to meet with Mr. Fulford to get him ready for his trial testimony. They gave us the permit application documents. This is signed by Mr. Purvis. This is impeachment testimony of the whole premise of his statement about the cost of the house.

THE COURT: Objection is overruled. I'll allow it. (In open court.)

BY MR. SIEGEL:

Q. To repeat my question—I'm sorry. To repeat my question, Mr. Purvis, you submitted the applications to rebuild the guest house to the—obtain the permit from the City of Fairhope; isn't that correct?

A. Yes.

Q. And is this the permit application (indicating—

A. Yes, it is.

Q. —that you submitted? That bears your signature at the bottom?

A. Yes.

Q. And that—the date that you submitted that was February 13th of 2006?

[114] A. That's right.

Q. And what you told the Town of Fairhope was that the guest cottage was going to cost a hundred forty thousand dollars; isn't that right?

A. That's right.

Q. But it cost a lot more than that if we do 250 to $300 a foot?

A. A lot more.

Q. And the date that you wrote the exhibit, I think it's 18 or 19, I'll use the Elmo, in January—the letter in this case where you come up with a million dollars worth of cost, that document is submitted on January 19th of 2006—

A. That's right.

Q. —where you say the whole thing is going to cost over a million dollars, right?

A. Right.

Q. But less than a month later, you're telling the Town of Fairhope that the construction cost is going to be at the rate of a hundred forty thousand dollars for the size of the guest house?

A. Right.

Q. And the per square footage rate at a hundred and forty thousand dollars for 2,800 square feet, I mean, we could all figure out the math, what would that be? What do you think that would be?

[115] A. I don't have any idea.

Q. Okay. All we'd have to do is take a hundred forty thousand dollars and divide it by 2,800 feet to get the per square foot?

A. Right.

Q. That would be less than a hundred dollars a foot, wouldn't it?

A. Right.

Q. So, you tell us in this case that it's $300 a foot, but you tell the City of Fairhope that it's less than a hundred dollars a foot?

A. That's right.

Q. Now, you consider yourself to be a good personal friend of Richard Preis, do you not?

A. Yes, I do.

Q. And I think we've already—I think you've already told us that you're not an expert on the causation of damage, meaning what caused the damage to Mr. Preis' home?

A. Right.

Q. And you made no evaluation when you prepared your letter as to how much of this million dollars was due to water or how much was due to wind. You're not here to testify to that?

A. No.

Q. Do you know what the term "actual cash value" means?

A. Yes.

[116] Q. Okay. Well, what do you think it means?

A. Well, as anybody would think, actual cash value is actually—

MR. PREIS: I'd like to object just a minute. May we approach?

(Sidebar conference, on the record:)

MR. PREIS: Mr. Siegel testified—objected to him testifying as an appraiser, and now he wants him to testify as an appraiser.

MR. SIEGEL: Judge, I'll rephrase the question.

THE COURT: Okay. Let's try to do as much of this out there so we don't keep coming to sidebar, if we can. Let's get the questions down and then proceed with the objections.

(In open court.)

BY MR. SIEGEL:

Q. Let me rephrase my question, Mr. Purvis. The estimate that you gave of the million dollar plus to rebuild the home, that's a—that's your estimate of replacement cost; isn't that right?

A. That's right.

Q. That doesn't account for any depreciation of the prior structure, does it?

A. No.

Q. I think that you—before you were even asked to write [117] this letter by Mr. Preis about the cost to rebuild the house that you actually inspected the property; isn't that right?

A. I wouldn't call it an inspection. I did go down and look at it.

Q. Okay. And the guest house was still standing, wasn't it, the original guest house?

A. Yes.

Q. It had some water damage, but it was still standing?

A. Right.

Q. Now, when you prepared the estimate in this case, the million dollar estimate, isn't it your practice and your business that you don't prepare estimates?

A. I don't.

Q. What you normally do day in and day out is you are fortunate to have clients who you build a house for them and then you tell them what it costs?

A. It's a little bit more than that.

Q. Okay. But you don't prepare estimates like the one that you prepared in this case in the normal course of your business, do you?

A. I do. And in a normal course when somebody asks me, usually it's what do you think this house is going to cost, and they say about what do you think this house is going to cost. And at the time I did that estimate, you know, I didn't know that we were going to be sitting here today or I probably [118] would have taken more time.

But I've been doing this for almost 40 years, you know, and I can pretty much look at something and get real close to what it's going to cost. And then I did the square footages and what I thought it would cost to replace it per square foot.

Q. So, if you knew you were going to have to testify in court, you would have taken more time and did a more detailed evaluation; isn't that correct?

A. If I was told that it was going to come to court, I probably would, and I would have something to back up my figures more than what I have. All I have is just sitting there and notes that I made how much a square foot. Don't even know if I still have it or not.

Q. Other than your estimate as to the square foot, you have no backup for your numbers, do you?

A. 40 years of building houses. That's all.

Q. Now, your estimate is based upon your presumed understanding that the price of the house—I'm sorry, that the square footage of the house was 5,500 square feet; isn't that what you testified?

A. And that's my assumption that, you know, at one time or another I must have measured that house because I've always had it in my mind that these were the footages.

Q. So, the answer to my question is, yes, your estimate is [119] based upon a 5,500 square foot house?

A. Right, right.

Q. Mr. Preis testified this morning that his house was 4,500 square feet. So, if that is true that the house was 4,500 square feet, not 5,500 square feet, we would have to reduce your estimate by about $250,000, isn't that right, based on $250 a square foot?

A. Let me explain. I told you a while ago the first floor of any house costs more than the second floor. Now, if we are going to take footages off, we've got to make a consideration that part of it would be the first floor, part would be the second floor.

Q. All right. And that would probably be too difficult to do, not knowing where the extra thousand square feet is.

A. Right.

Q. But you would agree that if the house is only 4,500 square feet and not 5,500 square feet, then your estimate would have to be reduced?

A. That's true.

Q. Now, when you build a house, you normally prepare a detailed set of plans and specifications?

A. True.

Q. And that shows all of the materials and all of the finishes that are going to go into every single room on a room-by-room-by-room basis?

[120] A. Not exactly. A lot of this stuff is done as work progresses. We do, you say, write a recipe, which all the plans pretty much detail everything, but it always changes.

Q. But what you're saying is you do normally prepare a detailed set of plans and specifications

which do have a room-by-room description of the work, but then changes may be made?

A. Sure.

Q. Okay. In this case, when preparing the letter for Mr. Preis, you did not prepare plans and specs?

A. No.

Q. And had no detailed room-by-room evaluation of what's going to go into each room in this house?

A. No.

Q. You have no stick estimate?

A. No.

Q. And the estimate that you provided, this million dollar estimate, is not based upon an identical rebuild of the house that was there, is it?

A. I assume that it would be what it would have cost to replace that house.

Q. Well, there were certain things that had to be done differently. First of all, it's not the—you weren't contemplating the exact same design, were you?

A. No, no. I was basing that on replacing that house [121] exactly like it was. And that's the question that was asked, what it would cost to rebuild that house.

Q. Mr. Purvis, do you remember when you gave a deposition in this case—

A. Yes.

Q. —in February of this year?

A. Yes.

MR. SIEGEL: Tara, do you have a copy, please. May I approach the witness, Your Honor?

THE COURT: Yes.

BY MR. SIEGEL:

Q. And I'm going to refer you to page 20, starting at line 13, question at line 13: "When preparing your

January 19, 2006, letter, were you assuming the house would be rebuilt exactly as it was, or were you assuming that the house would be—the home would be rebuilt to comply with current codes? What is the assumptions that go into this estimate you prepared?

"Answer: Well, it would have been built to comply with the current codes, and it would be—it would just be a comparable type building, not the exact design he has, he had, comparable finishes and generally the same type of construction."

Was that your testimony at that time?

A. That's correct.

[122] Q. And that was the truth?

A. Yes.

Q. So, what you're trying to do is do a fictitious similar home but not the exact home; is that correct?

A. Are you talking about when I did this estimate?

Q. Yes.

A. And the word "fictitious" kind of scares me.

Q. I'll rephrase that. Sometimes I get carried away. What you were contemplating in your estimate was to build something similar but not the exact thing that was previously there?

A. That's exactly right.

Q. You provided this estimate on January 19th of 2006, which is about four months after Hurricane Katrina; is that right?

A. That's right.

Q. Were there increases in costs during those four months?

A. Well, I don't know if it would be anything related to building a new house, but there was definitely a lot of cost increases in construction after the hurricane.

Q. Even in that four-month period of time?

A. Sure. Always happens.

Q. So, if we were going to try to evaluate what the estimate of constructing—if we were to look at your estimate and determine what would have been the cost on August 28th of 2005, the date before the hurricane, then your estimate would be lower?

[123] A. I can't really answer that truthfully.

Q. But prices did increase between August 29 of 2005 and the date of your estimate?

A. Yes. But I didn't take that in consideration when I was doing the estimate. But it always happens after a hurricane.

Q. Okay. And how much would the—are you able to estimate how much the costs increased between the date of the hurricane and January 19th, 2006?

A. No, I couldn't do that.

Q. Something between zero and 25 percent?

A. Right.

Q. Now, you testified that you built a new guest cottage, and what it really is is a 2,800 square foot home; is it not?

A. Exactly.

Q. But you have not rebuilt the main house, have you?

A. No.

Q. You haven't drawn up any plans and specifications and submitted them to the Town of Fairhope, have you?

A. No. We're just doing preliminary drawings.

Q. But nothing has been submitted to the Town of Fairhope?

A. No.

Q. Now, we talked earlier about that after you heard about the damage, I guess, because you were familiar with the home, you went and took a look at it just to see what had happened?

A. Yes.

[124] Q. And you had a hard time walking in the home because of all the debris that was inside?

A. That's true, in parts of the house.

Q. I'm sorry?

A. In some parts of the house.

Q. And which parts were those?

A. Well, I went through the living room. The living room was just full of debris.

Q. And the living room would be one of the rooms where the south, where the south wall had crashed in?

A. I believe the bedroom wall crashed in, didn't it?

Q. But regardless, there was—parts of the living room was filled with debris, and I think you were able to touch the nine-foot ceiling while standing on the debris?

A. Not in the living room. I think that was back—I walked through the study, which has a low ceiling, and I remember I walked across the lumber and I could touch the ceiling.

Q. How tall are you?

A. I'm about six-six.

(Laughter.)

A. Five-six.

Q. Five-six. Okay. And the debris that you saw appeared to be pier lumber, did it not?

A. Pier and deck, and it was all—looked like treated [125] lumber.

Q. It appeared to you that the pier lumber from several homes had been washed into the house?

A. Now, I couldn't say that. It could be just the lumber from his own pier.

Q. Let me refer you to page 75 of your deposition.

(Brief pause.)

Q. If you look, starting on line 14: "Question: And so there was several feet of debris then? Answer: There was quite a bit. Question: Sir? Answer: Quite a bit. Question: And debris is a general word. Could you be more particular about what? Answer: Well, probably everyone within three houses down's pier lumber was up in there. And cabinets were turned over, refrigerators turned over. It was a mess, TV's laying in the front yard."

That was your testimony in February of 2006—of this year?

A. That's exactly what I said.

Q. And that's exactly what you saw?

A. When I said the words probably everybody's lumber from three houses down, that was purely, you know, in a joking manner like. But that's exactly what I said.

Q. So, you took my deposition as a joke?

A. No, no, I didn't.

Q. You knew you were sworn to tell the truth, were you not?

[126] A. I was telling the truth.

Q. Now, after Ivan, you did some minor repair to the Preis home; isn't that right?

A. I think we did more to the pier than the house. I don't remember if we did much to the house.

Q. That's right. You repaired the pier, but there was no wind damage to the house due to Ivan, was there? There was no damage to the house from Ivan; is that right?

A. Not that I can recall.

Q. And after Katrina, you did repairs to two houses in the general vicinity of the Mobile, Eastern Shore of Mobile Bay, not too far from Mr. Preis' home; isn't that right?

A. Yes.

Q. And the repairs you did on both of those houses were, to your perception, were flood damage and not wind; isn't that right?

A. That's right.

MR. SIEGEL: Thank you, Mr. Purvis. No further questions.

THE COURT: Any redirect?

MS. MILAM: Yes, Your Honor. Thank you.

REDIRECT EXAMINATION

BY MS. MILAM:

Q. Mr. Purvis, if you will look at that screen in front of you, please. This is the same portion of that letter we [127] looked at a little earlier.

A. (Witness complies.)

Q. If you look at the first floor there, 4,200, 280, 560, and then the second floor, 1,100, is that where you got your 5,500 square foot number from, thereabout?

A. That's where I got it from. I don't know if that totals to be 5,500.

Q. I think it's actually a little over 5,500, but that's where you got your number from?

A. That's right.

Q. And that's based on your personal knowledge of the house; is that correct?

A. That's right.

Q. And your 40 years of building houses; is that correct?

A. That's correct.

Q. Did Richard pay you 250 to 300 a square foot to rebuild the guest cottage?

A. He probably paid me more than that.

Q. Did he pay you as a contractor or as a friend?

A. As a contractor.

Q. He didn't get a discount rate or anything, did he?

A. No.

Q. Has Mr. Preis approached you about rebuilding the main house?

A. Yes.

[128] Q. And have y'all, in fact, formulated a plan for the main house?

A. We have some preliminary drawings done.

Q. And do you have an approximate starting date on that house?

A. No. We had talked about sometime in October, I think.

Q. And then can I go to that footprint of the house, please. Thank you.

Mr. Purvis, you were talking just a minute ago about walking in the house and touching the ceiling. Will you circle the area of the house that was the living room?

A. (Witness complies.)

Q. Thank you.

A. Let me do that again. I didn't do it right.

Q. And that's where you said you could touch the ceiling?

A. No, I couldn't touch the ceiling there.

Q. Okay. Tell me where you could—let me ask this question: Where is the living room of the house?

A. Living room is just as you walk in the entrance door.

Q. Okay. And point to the entry door, please. I know it's

not there, but we're making believe an entry door.

A. (Witness complies.)

MS. MILAN: Okay. Thank you, Mr. Purvis. I have no further questions.

THE COURT: All right. You can step down. Thank

* * *

[211] to 4:05 p.m., then resumed.)

(The Parties present with Counsel.)
(Jury not present.)

THE COURT: All right. I think we've got everybody I need to talk to. I know we've got your witness that needs to be—needs to testify this afternoon, and we've got a jury that needs to go home sometime this afternoon. So, my idea would be to go ahead with the Plaintiffs to rest, to go ahead and take the witness, and then have argument on the motion after that, after I excuse the jury for the afternoon. That way, we don't hold them downstairs while we're hearing argument and the—

MR. SIEGEL: That's fair enough. We'll have the record held open, and we'll just take the witness.

THE COURT: Yeah.

MR. SIEGEL: That's fine.

THE COURT: So, why don't we do that. We'll just go ahead and bring the jury back up—

MR. PREIS: Could I just make an objection, Your Honor, on Mr. Gibson?

THE COURT: Yeah. Sure.

MR. PREIS: And I think the Court has seen the briefing on this. We believe that Mr. Gibson is being tendered as an expert witness to testify as to values, and obviously we don't believe it falls within the limits allowed by Rule 701. And Rule 701(c) was recently added, and it [212] basically says that a lay witness cannot testify if it's based on scientific,

technical, or other specialized knowledge within Rule 702.

And so the reason why this is set up this way is for obvious reasons, that if it's the type of stuff or the type of information that an expert witness would testify to, then it's not the type of opinion that a lay witness can testify to.

And the Federal Rules, as we know, sets out specific requirements of an expert witness, and it's that they be designated under Rule 26, that they go through a Daubert hearing, which this gentleman has not been through that, and that they are—we have the opportunity to raise that issue; and then finally, that we have the opportunity to depose him based on the methodology which is used.

And it's our position in this case to the extent that Mr. Siegel intends to use him as an expert on any issue of valuation, because he does not have any firsthand knowledge of this case any more than the other expert witnesses that have testified.

And to the extent that he testifies as to value or to causation, because he wasn't there, then he would be an expert within the meaning of Rule 702, and he wouldn't be allowed to testify as a lay witness.

THE COURT: Mr. Siegel?

MR. SIEGEL: Yes, Your Honor. And of course, this

* * *

[214] THE COURT: All right. And of course, I didn't have the benefit of the case cited by the Plaintiffs just here 45 seconds ago in the course of the order responding to the motions in limine, so I haven't had a chance to review that. But based on what I have reviewed, the order of the Court resolving this issue

on motion in limine stands, and the objection is overruled.

All right. Let's go ahead and get the jury up.

MR. PREIS: Your Honor, let me just ask this question before they come in: Is there any scope or limitation on the type of questions that Mr. Siegel can ask him?

THE COURT: I don't know. I haven't heard them yet. So, we will—it would be amiss if I were to try to anticipate what he's going to ask and rule right now on it. So, I have to hear the questions first.

(Brief pause.)

(Jury present.) (Trial resumed.)

THE COURT: All right. The jury is in. Please be seated. And Mr. Preis, I understand the Plaintiff has rested.

MR. PREIS: Yes, sir. We've rested our case and tender the case to the Defendants to put on their evidence.

THE COURT: All right. Ladies and gentlemen, the Plaintiff has rested its case, and we plan to take some additional testimony this afternoon in the Defendant's case.

[215] So, Defendant, if you will call your first witness.

MR. SIEGEL: Yes. We call as our first witness James Gibson.

THE COURT: All right. Mr. Gibson.

MR. SIEGEL: We may have to get him from the jury—from the witness room.

THE COURT: All right.

(Brief pause.)

THE COURT: And Mr. Gibson, if you will come forward, please, sir.

(Brief pause.)

THE COURT: Let me get you to step right around here, if you would, please. If you will raise your right hand and take an oath, please, sir.

JAMES LEE GIBSON,

having first been sworn, testified as follows:

THE COURT: All right. You can have a seat (pointing).

MR. SIEGEL: May I proceed?

THE COURT: Yes, sir.

DIRECT EXAMINATION

BY MR. SIEGEL:

Q. Mr. Gibson, would you please state your name and address for the record.

A. James Lee Gibson, 416 Fairwood Boulevard, Fairhope, [216] Alabama.

Q. I think we—the Court Reporter needs you to talk loudly into the microphone, if you can.

A. 416 Fairwood Boulevard, Fairhope, Alabama.

Q. And Mr. Gibson, what do you do for a living?

A. I'm an insurance adjustor.

Q. And what type of insurance claims do you adjust?

A. Well, I used to do wind insurance. I did that for six years. In the last six years, I've been doing flood insurance.

Q. For the past six years, is it flood insurance?

A. Yes, sir.

Q. And can you tell us what is involved in doing an adjustment on a flood insurance claim?

A. Yes, sir. Go to the property and adjust it room by room, and simply start at the floor and list the type of floor coverings and kind of moulding, and just go right up the walls, and list all the appliances. And if there's structural damage, you list the structural damage.

Q. And what are you looking for when doing an adjustment for a flood insurance policy?

A. Well, the purpose of it is to make the individual whole and put the house back in an as-was condition.

When you do an adjustment for a flood insurance policy, do you have to know what the policy covers and what it does [217] not cover?

A. Yes, sir.

Q. And what do flood policies cover?

A. Damage by water.

Q. And would that include both flooding and storm surge?

A. Yes.

Q. Would it include damage by wind?

A. No.

Q. So, when you do an evaluation of what's covered or what's payable under a flood insurance policy, do you have to make some determination of whether the damage is flood damage or whether it's wind damage?

A. Yes, sir.

Q. Go ahead.

A. If I think that there's wind damage, they have what they call the single adjustor program. And I would request the wind claim so that I could do both the flood and the wind.

Q. That would be if their policy covered both flood

and wind?

A. It would be a separate policy. The flood policy is owned by the Federal Government, and the wind policy would be—it could be State Farm, Lexington, it could be anybody. But under the single adjustor program, they try and use one adjustor whenever possible so that we can differentiate between the wind and the flood.

[218] Q. And that, and that is what you do in your job as a flood adjustor?

A. Yes, sir.

Q. And when you—as part of your job as a flood adjustor, do you also have to make some sort of estimates or valuations of the amount of damage?

A. Exactly. I have to know, have to list all the damages and what, you know, what it would cost to repair them. Now, we use a computer program that, you know, assists in that greatly.

Q. And what is the computer program that you use to determine the value of the claim?

A. We use a program called SIMSOL. And it's used by contractors to build houses, it's used by flood adjustors, used by wind adjustors.

Q. Okay. Now, did you do any adjustment of the residence of Richard Preis in Point Clear, Alabama?

A. Yes, sir. I did two claims there.

Q. And what were the two claims that you did?

A. One was on a guest house, and one was on the primary house.

Q. And was that a flood adjustment that you did?

A. Yes. It was a flood adjustment.

Q. And in order to do that flood adjustment, did you have to inspect the property to see what was damaged by flood and [219] whether there was anything damaged by wind?

A. Yes, sir.

Q. And based upon the policy that you were making this determination, did it cover wind damage at all?

A. Sir, I seen no wind damage. It was all flood damage.

You know, there was damage to the roof, but it was because walls were knocked out. But the basic roof, I mean, materials on top of the roof was not damaged. What had happened when the walls got knocked out, the roof went eschew and fell—excuse me.

Q. Would you like some water?

A. The roof fell down. Yeah, I could use a glass of water or a drink of water.

(Brief pause.)

MR. SIEGEL: May I approach the witness, Your Honor? THE COURT: Yes, sir.

(Brief pause.)

THE WITNESS: Thank you.

A. Well, like I say, the underpinning that was holding the roof up when the storm surge came in and knocked the walls down, and of course, at that point the roof sagged. You can't just put that roof back up there. You have to replace, you know, the rafters and everything and put on a new roof. So, that was covered under the flood policy.

Q. Okay. And I'll get to that in a minute. But if I [220] understand what you just said is that your observation based upon your training as a—and experience as an adjustor both for wind and flood is that you saw evidence of flood damage but saw no evidence of wind damage?

A. I saw no evidence of wind damage at all.

Q. Now, when was it that you inspected the Preis

home, if you remember?

A. I can't tell you the exact day. I was there on three, four days. You know, it wasn't a one-day job. This was a very large house. It was 7,000 square foot in the one building, had five bathrooms. And it took two of us three good days, plus we come back twice more after that, I think.

Q. If we could go to Exhibit 36, please.

(Brief pause.)

Q. And it will appear on your screen, Mr. Gibson, in a moment.

A. All right.

Q. Can you—scroll back to the top. Can you tell the jury what this is?

A. Yeah. That's my building estimate for the Preis home, the main building.

Q. Is this your adjustment of the Preis home for damages due to flood?

A. Yes, sir.

Q. And it says there that the data of your report is [221] December 8th of 2005?

A. Right.

Q. So, your inspection would have been sometime prior to—

A. It would be prior to that. I had like almost a hundred claims, so this was just one of many.

Q. Do you have any idea as to how long it would have taken you to get your report done? Or if you can't, just tell me.

A. Well, from the time you go out and you inspect the premises and then you come back and enter everything into the computer and you send it into the company, and then if they can find the least little thing wrong, they send it back. So, the whole process from beginning to end, if that was the only claim I

was to work on, would be about a week on this size—on this particular claim.

Q. Okay. So, your inspection would have been, based on your best estimation, how long before December 8th of 2005?

A. Well, it took a long time to close this because of, like I say, because of the size of it, and I was working so many claims, and my wife came down with cancer during this same period of time. But I'm trying to remember the exact date that that hit. But I was there within, I think, within a week after the initial storm hit and started working it.

Q. So, if Hurricane Katrina was on August 29th of 2005, within the first week or two of September is when you inspected the property?

[222] A. That's correct.

Q. Now, Exhibit 36 is a lengthy report of some 40 pages; is that correct?

A. Yes, sir. I think it is around 40 pages.

Q. And that is your flood adjustment and building estimate for the Preis residence?

A. That's correct.

Q. And I'm not going to go through page by page, but what that basically shows is the damage that you found in each and every room of the house?

A. Yes, sir.

Q. And again, it's all flood and storm surge damage?

A. Yes, sir. This is for repairs now. It's not to build a new house. This is strictly repairs. The foundation is still there and a lot of the electrical and stuff.

Q. All right. So, if we look at your estimate recap that you have on your first page of your report?

A. Yes, sir.

Q. Where you say the estimate grand totals, right above that line (indicating)?

A. 553,000.

Q. I'm sorry, I'm looking not in the building valuation but in the estimate recap.

A. Oh, the estimate recap.

Q. Yes, sir.

[223] A. The grand total, let's see, it was 351,000 and—well, down at the bottom, the final total was $335,463.93.

Q. So, those numbers, the 335,000—well, let's start with the number, the 351,314.58.

A. Right.

Q. Is that your estimate of the amount of what the cost would be to repair the damage that you saw to the Preis residence?

A. That's correct.

Q. And included in that estimate, you included to repair and replace the entire roof; is that right?

A. That's correct.

Q. Now, why did you include the roof?

A. That's the lower roof. There's a section that is a—is a two-story, and there was no damage on that roof, to the best of my knowledge.

Q. Okay. So, the roof that you included in your estimate would have been on the lower or the older portion of the house?

A. Yes, sir.

Q. And why did you pay for the roof in your flood estimate?

A. Like I stated before, the walls had been knocked down.

And when the walls, when the walls went down, some of the interior walls supported like the center portion, but the outer portion of the roof, it fell down

when the wall went [224] down. So, to put that back up and to straighten everything out that's inside, you'd have to replace the ceiling joists and everything. So, I paid for all of it.

Q. So, did you include the entire lower section roof in your flood estimate?

A. Yes, sir.

Q. Did you include the entire destruction of the walls in your flood estimate?

A. Yes, sir.

Q. And that would be the southwest wall and that northwest wall that was damaged?

A. Yes, sir.

Q. Okay. And both of those are walls that you paid for in your flood estimate?

A. Yes, sir. That and the—there's a fireplace there that was also damaged by debris.

Q. Okay. Now, you have a line item for total depreciation of $14,850. And before I get to that, how did you calculate $351,000 as being the value of the repair costs for the entire structure?

A. Well, let me explain just shortly why we do this. It's not to set a real accurate value on the house. The purpose of it is so that we don't pay more to repair the house than what the house originally, you know, what it would cost to rebuild the house.

[225] And the way we do that, there's—within the pro-gram, you go room by room and it will ask you, like on the bathrooms, if the fixtures are high grade, medium, or low grade, what kind of floors are in the bathrooms, and just different things throughout the whole house as to what the quality of the items within the house are, because you're going to have some houses are going to have very, very expensive bathroom fixtures and marble countertops, and you're going to go someplace else and they're going to

have a piece of Formica on there with a piece of aluminum strip on the front of it. So, you have to base your estimate on the quality of the house. And I rated this one very high.

Q. Okay. So, if I understand that the—when you plugged the data into the computer, the SIMSOL program—

A. Yes.

Q. —that you described as a contractors and an insurance program—

A. Right.

Q. —that you plugged in the amount of house material and you plugged in the quality?

A. Right. The quality of the kitchen cabinets. There's marble tops on their kitchen cabinets. That added quality. They had a very expensive stove in there. That added to quality. And you just, you put all these items into the computer, and then it comes up with a price.

[226] Q. And all of that is put into what results in the estimate total of $351,314 for repairs?

A. That's correct.

Q. Now, where did you come up with the depreciation number of $14,850?

A. Well, I didn't depreciate the house very much for the simple fact he had had a prior loss in 2004 for like a hundred and twenty-eight thousand, somewhere in that neighborhood.

And a lot of the items within the house were new and had been repaired, you know, under a previous flood. So, most of the things were either new or in very, very good shape.

Q. So, you're saying that the prior loss was also a flood loss?

A. Yes, sir.

Q. Now, the—it looks like what you did is you took that $351,000 number and deducted the depreciation to come up with an ACV estimate?

A. Yes, sir.

Q. And what is ACV?

A. ACV is actual cash value. And that's after you take away the depreciation.

Q. So, is ACV simply a calculation of repair costs minus depreciation?

A. Yes, sir.

Q. And that's how you came up with a final total of $335,000 [227] as the damages to the Preis structure?

A. Yes, sir.

Q. Now, did Mr. Preis also submit to you a contents claim?

A. Yes, sir.

Q. And is that because the flood policy included a hundred thousand dollars coverage for contents?

A. Yes, sir, a hundred thousand dollar coverage on the contents. That's a maximum under the flood policy.

Q. And let's be clear. You only adjusted and evaluated the primary flood policy; you did not adjust and evaluate the excess flood-

A. No. There was another adjustor that did the excess.

Q. Okay. And if I can—we can go to Plaintiffs'—I'm sorry, Joint Exhibit 21. And we—this has already been admitted into evidence and we've already seen it before. Is this the—does this appear to be the—

A. Yes.

Q. Let me finish my question. The contents list that was submitted to you by Mr. Preis?

A. Yes, it is.

Q. And he would have submitted that to you prior to the date of your report on December 8th of 2005?

A. Yes. I have to have this in order to work up the estimate.

Q. And as I understand it, based upon your estimate and [228] evaluation, the primary flood policy paid the $250,000 limits for the structure?

A. Yes, sir.

Q. And the hundred thousand dollar limits for the contents?

A. Yes.

Q. And then did you also adjust the policy and the coverage for the guest house?

A. Yes, sir, I did.

Q. And we've already seen that the policy limits for the guest house was—

MR. PREIS: Your Honor, I object to the form of the question. He's leading the witness. And Mr. Siegel's testifying, and it's—

MR. SIEGEL: I'll rephrase.

MR. PREIS:—he can ask him the question.

MR. SIEGEL: I'm just trying to save time. I'll rephrase.

THE COURT: All right.

BY MR. SIEGEL:

Q. Do you know what the limits were on the coverage on the guest house?

A. Well, I did at the time because I had the doc sheet on it, but I don't have it with me now. And I—you know, I adjusted so many. I don't remember.

Q. Okay. Let me ask you this question: Do you know if you [229] paid policy limits for the guest

house both for structure and contents?

A. I believe I did, yes.

MR. SIEGEL: One minute, please.

(Brief pause.)

MR. SIEGEL: Your Honor, in connection with Mr. Gibson's testimony, we would offer, file, and introduce into evidence Exhibit Number 36, which is his flood estimate, the building estimate that he's been discussing.

MR. PREIS: Your Honor, we object to that as we previously stated to the Court.

THE COURT: All right. It's admitted subject to the previous objection.

(Joint Exhibit Number 36 was received in evidence.)

MR. SIEGEL: And Your Honor, I have no further questions of the witness.

THE COURT: All right. Mr. Preis?

CROSS EXAMINATION

BY MR. PREIS:

Q. How are you, Mr. Gibson?

A. Just fine.

Q. Phil Preis. How are you doing today?

A. Just wonderful.

Q. Are you bearing up pretty well under the heat?

[230] A. Yeah. It's kind of warm out there.

Q. I know. I know. What was the total cost to replace Mr. Preis' house totally?

A. To totally replace the house?

Q. Yes, sir.

A. I have no idea.

Q. Well, explain to the jury what you did. In other words, you didn't go in there and look at what it cost

to totally replace the house; is that right?

A. The policy doesn't cover total replacement of a house, so there's no need for me to do that.

Q. Well, did you assume that part of the house was salvageable when you went over there and looked at it?

A. Well, the way the policy works is you go and you assess the damage and you figure out what it's going to cost to put it back in its original pre-disaster shape.

Q. Yes, sir. What—

A. You don't look at building a new house.

Q. Yes, sir. What amount of this house did you assume was salvageable?

A. Well, when you say salvageable, you mean being able to rebuild it?

Q. Or you just didn't have to go in and replace it.

A. Well, you're not going to [231] have to replace the foundation.

Q. Is that the only thing you assumed that wasn't going to have to be replaced, that you could tear everything else down except the --

A. No. The back part of the house had very little structural damage. The main damage was on the front part of the house where the waves came in and the debris came in and, you know, ended up inside of the house.

Q. Yes, sir. I understand. I just want to make sure we're comparing apples and oranges here.

A. Yes, sir.

Q. So, in your analysis, when you come up with a number, you assume that the back part of the house was okay; is that correct?

A. Yeah. The walls were knocked out of the back part of the house.

Q. Yes, sir. But I understand that—now, does it change your view of it any if I tell you that the City of Fairhope said the whole thing had to be torn down?

A. Well, they base that on it was damaged in excess of 50 percent. And this is not the first flood. This is, think, the second or third flood. And under the Federal policy, you have no choice but to tear it down and go up.

Q. Yes, sir. What would have been your loss if you had to assume that the whole thing had to be torn down?

A. You know, I wouldn't even wing that.

Q. You don't know, do you?

[232] A. I had no reason to know because that's not what I was there for.

Q. Yes, sir. And you don't know what it would have cost to replace that entire house, do you?

A. No, I don't know what it cost to replace the entire house. I could sit down and figure it up if I had to.

Q. Yes, sir. But that report doesn't do that, does it?

A. No, sir. This is a repair. This is to repair an existing structure, which is all the Federal Government owes for.

Q. Yes, sir.

A. We're not in the business of building—

Q. And in your analysis, you just assume that the only part of the house that had to be repaired was the old part; isn't that right?

A. No. In my analysis and what I did, I looked at what was damaged, and that's the way I wrote the repair. I didn't make any assumptions.

Q. Yes, sir. Now, you rated the quality of this house very high with very little depreciation; isn't

that correct?

A. That's correct. And like I say, that's based on the fact that in 2004, they had a hundred and twenty-eight thousand dollar claim on the house. And most everything—you know, a good bit of it had already been repaired, so it wasn't that old a structure.

[233] Q. Yes, sir. Now, you said the total square footage in the house was approximately 7,000 square feet?

A. I think so, yeah.

Q. Yes, sir. How much money did you allow Mr. Preis per square foot?

A. The way that works, it works on a—it's a program the Federal Government has. And what it is, they take the—your—not area code, your zip code. And it's based on the zip code and what the prices are in that area for labor.

Q. Yes, sir. Let me show you a calculation I just made, because I haven't talked to you before today, have I?

A. No, I've never talked to you before, I don't think.

Q. My calculation is that comes up to $47 a foot. Look at the monitor there right to the side of you.

MR. SIEGEL: Your Honor, I object. This has got 7,000 square feet, and the testimony is it was 4,500 square feet.

MR. PREIS: Your Honor, I object to Counsel testifying. The witness has testified that it's 7,000 square feet. That's what the witness testified to.

THE COURT: Objection is overruled.

A. That's—let's see. Hang on a second. The square feet that I'm showing here is 7,099, but I

think they were paying—for some reason, I was thinking it was $73 a square foot on some of it. But this is based on the upstairs also, [234] and we were dealing with the downstairs.

BY MR. PREIS:

Q. So, just to make sure I understand your testimony is that you didn't include anything for the upstairs?

A. No. I never even went upstairs.

Q. Okay.

A. The flood waters didn't go upstairs, and there was no wind damage up there, so—

Q. Now, if I told you—do you know a gentleman by the name of Bill Purvis?

A. Who?

Q. Bill Purvis, as a contractor.

A. Purvis. I can't—I can't place him.

Q. You don't recognize that name?

A. I might have done a claim. Seemed like I did a claim on a Purvis house down on the water.

Q. Well, let me ask you this: How many houses have you ever built?

A. Have I built?

Q. Yes, sir.

A. Probably about five.

Q. You built them yourself. So, you would have an Understand—

A. No. I have a very good understanding of what building is.

[235] Q. Okay. Now, Mr. Purvis testified today to this jury that it cost $250 a foot to replace that house. Would you have reason to disagree with him on that?

A. That would seem high to me, but that really has no bearing on this flood policy.

Q. And why do you say that?

A. For the simple fact that what we are doing here is repairing, and our prices are based on repairing, not building a new house.

Q. And so if you are wrong about repairing the house—

A. I'm not wrong about repairing the house.

Q. In other words, it's your opinion here today that the house should have been repaired versus rebuilt; is that correct?

A. No. I'm telling you what the Federal—under the Federal flood policy, we don't build new houses—

Q. Yes, sir.

A. —for people.

Q. But the reason you are being offered for testimony here today is what's the amount of the loss. And the question that I am asking you is, is that if you rebuild that house in its entirety, do you have an opinion as to what it would cost to do that?

A. No.

MR. PREIS: No further questions, sir.

[236] THE COURT: Mr. Siegel?

MR. SIEGEL: Briefly, Your Honor.

REDIRECT EXAMINATION

BY MR. SIEGEL:

Q. Mr. Gibson, Counsel asked you about the square footage. And if we could get Exhibit 36 back up. The diagram is what I'm looking for. Your calculation of square footage is going around the entire diagram that I'm showing up here in this section of your report; isn't that right?

A. Yes.

Q. So, that would include all of the porches and

everything else; would it not?

A. Yes.

Q. Well, that 7,000-foot calculation—

A. Right.

Q. —is more than the heated and cooled space?

A. Yes.

Q. Now, Counsel asked you about demolition, tearing down and rebuilding of the house. Did you also assist Mr. Preis in getting demolition money from FEMA?

A. No.

MR. PREIS: I'm going to object to the form of the question. Counsel is testifying as if he has him on cross-examination. He can ask him the questions that I asked [237] him, but he can't testify.

THE COURT: All right. Sustained as asked and answered.

MR. SIEGEL: I'm sorry, I didn't hear the answer. Let me rephrase the question.

BY MR. SIEGEL:

Q. Did you assist Mr. Preis in submitting a claim to FEMA for ICC money?

A. No. That's a separate, that's a separate claim.

Q. So, you were not involved in that?

A. I was not involved.

MR. SIEGEL: No further questions.

THE COURT: All right. You can step down. Thank you, sir.

THE WITNESS: Thank you.

THE COURT: All right. Ladies and gentlemen, it's 4:40. Seems like a good time to break for the evening. So, we're going to take a break and recess for the

evening.

Remember my instructions to you. And you are not allowed to talk to anyone about this case or allow anyone to talk to you about it. Don't read or listen to anything that may be touching on this case in any way. Don't make any investigation about this case on your own, and don't form any opinions until you hear all the evidence.

Have a good evening. Go home and relax. And if you will [238] be back in the Jury Assembly Room at a few minutes before nine o'clock tomorrow morning, we'll get you back up here by 9:00. Thank you. Have a good evening.

(The jury was placed in recess at 4:40 p.m. this date.)

THE COURT: All right. We had reserved argument on the Defendant's motion until after testimony of Mr. Gibson.

Mr. Siegel, are you ready to be heard?

MR. SIEGEL: I am, Your Honor. Can I speak from here as long as—

THE COURT: Yeah. Just turn that on. That's fine.

MR. SIEGEL: Is this on?

THE COURT: No. Push the button. There's a green button on the bottom.

(Brief pause.)

MR. SIEGEL: It says "push". That might help.

(Brief pause.)

MR. SIEGEL: If I can hand the—it's not stapled and it's not signed.

THE COURT: That's fine. It doesn't matter.

(Brief pause.)

MR. SIEGEL: Your Honor, we—on behalf of Lexington Insurance Company, we move for a Rule 50 judgment as a matter of law. And I'll be brief with this, but the main point of our motion is twofold, and it really deals with burden of proof issues. And we know that it is Lexington's [239] burden to prove an exclusion, but before we get to that point, under applicable law, under the Louisiana law that we've both agreed is the applicable law in interpreting the policy, the Plaintiffs have to prove that they suffered an accidental direct physical loss to their property, that the losses are covered losses under the terms in the Lexington policy, and the amount of their covered damages; and that the burden, the Defendant's burden does not start until Plaintiffs have proved all three components of—the Plaintiffs have proved the three components of their burden of proof.

In this case, Plaintiffs have proved, have introduced no witnesses to testify—certainly, we do know there was direct physical loss to the property. That's—we understand that. But they have proved—they have offered no evidence or no witnesses to show that their losses are covered under the policy or, more importantly, the amount of covered losses. Both Mr. Purvis and Mr. Sealy said they did not make that evaluation or make that determination separating out wind from water damages. So, given that the Plaintiff has not carried that burden, then the shifting of the burden to the Defendant to prove the exclusion does not exist here.

I might also point out, and I don't think this is mentioned in the written papers, but we hurriedly put this together, but under Your Honor's ruling this morning, the Plaintiffs have the burden to prove the

actual cash value, not [240] the replacement value, but the actual cash value of their damage, whatever that damage may be, and they provided no evidence of the actual cash value of the damages at the time of the loss. The only evidence they offered was from Mr. Purvis, who testified in response to my questions that all he was providing was a replacement cost and not an actual cash value.

So, for those reasons, we would move the Court to dismiss the claims against Lexington under Rule 50 as a matter of law.

THE COURT: Okay. Mr. Siegel.

MR. PREIS: Your Honor; I think the --

THE COURT: I'm sorry, Mr. Preis.

MR. PREIS: That's okay. Long day. The cash values he refers to is defined as replacement cost minus depreciation. And in terms of meeting that burden, Mr. Purvis did the analysis within, let's see, it was January, within four months of the date of the loss. And I certainly think that that's contemporaneous enough for the Court to consider what the value of the house was as of that date.

In terms of the depreciation, the only issues in evidence, there's no depreciation other than the amount that was just testified to by Mr. Gibson, which is no depreciation. And I mean, we certainly don't have the burden to put on what the depreciation was when everybody has testified as to the high quality of the house. And even with that number, it's

* * *

[247] THE COURT: You've got to get a little closer to the Court Reporter or a microphone.

MR. PREIS: I said a number of the courts have rule

that concurrent causation is not applicable to these policies, and Lexington has even taken that position in this case.

THE COURT: All right.

MR. SIEGEL: And just to make it clear, Your Honor, we are not taking the position that because there was some flooding to the property that the wind damage isn't covered. That is not our position.

THE COURT: Okay.

MR. SIEGEL: But the other provision that applies here is on page seven of 18 under Coverage C, personal property, where it explains what we do cover for the contents And it says: "We insure for direct physical loss to the property described in Coverage C," that's the contents, "caused by a peril listed below unless excluded in Section One, exclusions."

And then it says: "Windstorm or hail. This peril does not include loss to the property contained in the building caused by rain, snow, sleet, sand, or dust, unless the direct force of wind or hail damages the building causing an opening in a roof or wall and the rain, snow, sleet, sand, or dust enters through this opening."

So, it has to be caused by rainwater applicable to this.

* * *

[249] Parties, and this is from the Defendants, it's a cite in a footnote to a Couch on Insurance. And again, this is the only legal basis I have to charge the jury. And the charge would be: It is an insured's burden, Mr. Preis' burden, to produce evidence that would afford a reasonable basis for estimating the amount

of damage or the proportionate part of damage caused by the covered peril and that by the excluded peril.

And so the question is, what is the evidence in this case?

MR. PREIS: That's not the law, Your Honor.

THE COURT: Well, you haven't presented me anything that tells me what the law is.

MR. PREIS: Oh, yes, sir, we have. We put in there as to the burden of proof. I mean—

THE COURT: Well, where is the legal basis for that, Mr. Preis?

MR. PREIS: Well, they have the burden to prove what their exclusion is. We—

THE COURT: Yeah, I understand that. But you have not provided me any law that gives me any foundation for that. The only law I have is this—

MR. PREIS: Sir, in all due respect, it's in the—you cited it two times in your opinion as to who has the burden on the exclusion, and it's in the Katrina litigation and everywhere. I mean, there is no question about it that

* * *

APPENDIX Q

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil No.: 06-0360-WS

RICHARD PREIS and VICTORIA HEARIN PREIS,
Plaintiffs,

vs.

LEXINGTON INSURANCE COMPANY,
Defendant,

August 14, 2007
Courtroom 2a
U.S. Federal Courthouse
Mobile, Alabama

VOLUME II

CONTINUATION OF THE
JURY TRIAL PROCEEDINGS

Before The Hon. William H. Steele
United States District Judge

(August 14, 2007, 8:45 a.m.) (In open court.)
(The Parties present with Counsel.)
(Jury not present.)

[254]THE COURT: Good morning.

MR. PREIS: Good morning, Judge.

THE COURT: Please be seated. All right. Any additional matters that we need to take up this morning, Mr. Preis? I know we're making copies of some case, but did you want to present any additional—

MR. PREIS: Your Honor, the only thing that I was going to add is that in the case State Farm, Broussard versus State Farm, which was decided by the Court on August 2nd, 2007, in the Eastern District,' they make the distinction between an all—a perils policy and an all-risk policy. And it's exactly the argument that we were making yesterday, that once that we put in the total damage, then it's the insurance company's duty to go in and show that it's excluded. And it's a difference between a perils policy and an all-risk policy.

And in this particular case, the special personal property coverage endorsement makes Coverage C an all-risk policy just like the Coverage A and B.

THE COURT: All right. Mr. Siegel?

MR. SIEGEL: Yes, Your Honor. I think the distinction is a meaningless distinction because all an all-risk policy is is it covers risk except where excluded. [255] And I pointed out to the Court yesterday the places in the policy where water damage is excluded and where for contents for the personal property where they have to prove that there was an opening in the roof and that rainwater damaged the property.

I would also point out to the case that the holding of the Broussard decision decided by Judge Sarah Vance in the Eastern District just earlier this month is: "The Court finds that in order to recover for a

breach of contract—breach of insurance contract, Plaintiffs are required to prove the amount of their claim for covered damages under their homeowners policy by a preponderance of the evidence." And then the Court cites how that's consistent with Couch on Insurance.

In this case, not only for the contents but also for the structure case that the Plaintiffs have presented, they have not proved the amount of their covered damages. So, the burden never shifts to the Defendant to prove its exclusion.

So, based upon the fact that Plaintiffs have not met their burden both for the contents claim and for the structure and for any other part of their claim, the Plaintiffs have not met their burden of proof, and we would reiterate our motion for a judgment as a matter of law.

MR. PREIS: Your Honor, and what I would like to add is the holding in this case relates to a perils policy. And [256] for the—and I think the legal issues being submitted by Mr. Siegel, and he stated, he says the evidentiary burden is the same with a perils policy as it is an all-risk policy. And he says that there's no distinction between a perils policy and an all-risk policy, and I don't think that's the law.

MR. SIEGEL: Judge, I don't think the case says that it's a perils policy, Broussard case. I don't think it says that.

THE COURT: All right.

MR. SIEGEL: That the State Farm policy was a perils policy.

THE COURT: All right. I find it interesting that we're here at this stage of the proceeding arguing

these legal matters. My pretrial requirements are designed to prevent exactly this from happening. These are issues that should have been resolved prior to pretrial on summary judgment or at pretrial on motions in limine, certainly before we have to get to the point of considering this at the close of the Plaintiffs' case or with regard to jury charges, and that's where we are.

I note that the Plaintiffs filed a brief at 9:56 last night. I have not had a chance -- I started reading it this morning. I have not had a chance to fully digest that brief. I know it tries to make some distinction about the perils policy and the all-risk policy and also brings into question

* * *

[381]A. No, sir.

MR. SIEGEL: And just one minute.

(Brief pause.)

BY MR. SIEGEL:

Q. Mr. Fisher, does this photograph tell it all (indicating)?

A. Yes, sir, I believe it does.

Q. Because if the winds were strong enough to do catastrophic damage, you would not expect to see that weather vane and those shingles, would you?

A. No, sir, you would not.

MR. SIEGEL: Thank you, Mr. Fisher. No further questions.

THE COURT: You can step down. Thank you. Your next witness?

MR. SIEGEL: Yes, Your Honor. The Defendants call Tracy Clark.

THE COURT: All right.

MR. SIEGEL: Who will be our final witness, Your Honor.

(Brief pause.)

THE COURT: Mr. Clark, let me get you to come forward, if you would, please. If you will step right around here. Raise your right hand and take an oath, please, sir.

THE WITNESS: Yes, sir.

[382]TRACY CLARK,

having first been sworn, testified as follows:

THE COURT: All right. You can have a seat (pointing).

MR. SIEGEL: Your Honor, may I remove the deposition from the witness stand?

THE COURT: You may.

(Brief pause.)

DIRECT EXAMINATION

BY MR. SIEGEL:

Q. Mr. Clark, would you please state your name and address for the record.

A. Tracy Clark, 5676 Adolphus Street, Catawba, North Carolina.

Q. And what do you do for a living, Mr. Clark?

A. I'm an adjustor.

Q. Okay. And by whom are you employed?

A. Reed, Jones, McRorie and Williams.

Q. And what is Reed, Jones, McRorie and Williams?

A. It's an independent adjusting firm that specializes in catastrophe adjustments.

Q. How long have you been employed as an adjustor?

A. Since the early '90's.

Q. Okay. And what type of claims do you adjust for Reed, Jones?

[383] A. We do primarily catastrophe work, which is hurricanes, hail, that type of work. But I've done all types of claims for them.

Q. Okay. Have you done evaluations of wind, wind claims from hurricanes and other storms?

A. Yes, I have. I've worked hurricane claims since Fran and Bertha in the early '90's.

Q. Okay. And are you able to estimate how many wind claims that you've adjusted?

A. It would be hard, but if somebody told me I had done a thousand claims, I wouldn't be surprised.

Q. Okay. Generally speaking, what's involved in the adjustment of a wind claim?

A. Typically, what you're going to do is go out and look at the home. Of course, you're going to go out and originally introduce yourself to the insured, look at the home and try to ascertain what the damages are. You're going to go through the inspection process by climbing on the roof, for example, walking around the home, looking for signs of damage, talking to the insured about what they feel is damaged by the wind. And if there's a contractor involved or somebody else involved, then you try to talk to them as well.

Q. Okay. Do you have to have an understanding of the provisions of the insurance policy under which you are adjusting a loss?

[384] A. Sure. If you don't have an understanding of the insurance policy, I don't know how you would adjust it.

Q. Okay. And do you have familiarity and at the—you were the adjustor that was retained by Lexington

Insurance Company to do the wind adjustment of the Preis home?

A. Correct. Well, they retained Reed, Jones, who retained me to look at it for Lexington.

MR. PREIS: Your Honor, my objection is continuing under Rule 701 and 703 concerning the question of opinion of lay witnesses.

THE COURT: All right. I haven't heard an opinion at this point, but—so the objection is overruled at this point.

MR. PREIS: Yes, sir.

BY MR. SIEGEL:

Q. Now, are you aware that the HO-3 policy form covers damage due to wind but not flooding or storm surge?

A. That's correct.

Q. Now, in order to determine what is the covered—when you do a wind evaluation, do you have to make a determination of what the covered loss is?

A. Yes, you do.

Q. And in order to do that, confining ourselves to the example of wind versus water, do you have to make at least a preliminary evaluation as to what is covered by wind and what [385] is covered by water?

A. Yes. You need to be able to separate the damages. What you're looking for from a professional adjustor is to say this damage was wind, this damage was water. And then you're primarily concerned, from my viewpoint, I was the wind adjustor with the wind damages.

Q. Okay. And is that something based upon your experience and training as a wind adjustor that you have developed the knowledge and the ability to make that at least preliminary determination?

A. Yes. And there are certain earmarks that you look for when you're separating, trying to separate the damages of the two perils.

Q. And is that what you did in—with respect to this case?

A. Yes, it was. You look at the actual damage to the structure, but you also look at some of the surroundings and some signs of—for water or wind or that type of thing.

Q. Okay. And do you know when it was that you first inspected the Preis property?

A. If memory serves, it was the middle of September the 15th, I think.

Q. Of 2005?

A. Correct.

Q. So, roughly two weeks after the hurricane?

A. Correct.

[386] Q. And were you there at the Preis residence as—on behalf of Lexington Insurance Company?

A. Yes, I was.

Q. Now, tell me what you did when you went to the residence.

A. I went to the residence to inspect the home for wind damage, and et cetera. When I first got there, I met Mr. Preis' wife, who was extremely distraught over the damage to the home. She told me it had been a family home, et cetera. I spoke with her for a while, just let her talk to me about what the problems were and what concerned her. I think it's important to let people get that off their chest.

And then once that was done, I went and inspected the home. I walked around the home. I looked at the pier, for example, to see what the the damages to that were. I looked at the boathouse. You couldn't get on the pier because there weren't any planks left on

it. I looked at the house itself, looked at the interior, photographed the interior, climbed up on the roof, inspected the roof, photographed the roof. I walked through the home and basically tried to assess what the damages were and what the damages weren't.

MR. SIEGEL: Excuse me just one minute, Your Honor.

(Brief pause.)

BY MR. SIEGEL:

Q. And did you render reports in this case?
A. Yes, I did.
[387]Q. Okay. What I'd like to go first to is Joint Exhibit 33, which I believe has previously been introduced into evidence.

THE COURT: All right. We don't show that as previously admitted.

MR. SIEGEL: Your Honor, this was a document that the Plaintiffs sought to introduce that I had a preliminary issue with, and I'll withdraw my objection.

THE COURT: Okay. The exhibit is admitted then.

(Joint Exhibit Number 33 was received in evidence.)

BY MR. SIEGEL:

Q. Is this your first report, as it says?
A. It certainly seems to be.
Q. Okay. What I'd like to do is scroll down to the bottom of the page. And when you prepare a report like this, do you also prepare an estimate?
A. Typically, yes.
Q. And what is an estimate?

A. An estimate is what you feel the damages to the home are for—that are covered under the policy we're sent out to inspect it on—

THE REPORTER: I'm sorry, for what?

A. It's—an estimate is something that the damage to the home is that's covered under the policy you're sent out to inspect it for. So, you could have a flood policy, the damage [388] could be one thing, and wind policy, the damage could be something else.

Q. And when you say that all damages that were—and is that a dollar value estimate?

A. Yes, it is.

Q. And when you say that all damages that were estimated by this adjustor are from wind and appear covered, when we look at your damage evaluation estimate, that's what you—the dollar value, that's what you're talking about?

A. Correct.

Q. Okay. If we could scroll to the next page, please. In that first section, where it says Coverage A, first of all, what is Coverage A?

A. It's the coverage for the structure itself, the actual building.

Q. Okay. And where you say that you observed extensive damage to walls, ceilings, and floors due to tidal surge from Hurricane Katrina, tell me what you're talking about there.

A. The front section—well, several things. In the rear of the home, there was a lot of debris that had been washed to the back of the house. It was obvious there was quite a bit of structure that was laying back there.

But when you got to the front of the house, there were—part of the house had fallen in. There were walls that had been moved by the tidal surge. There

was pretty extensive [389] damage from a dollar standpoint and from a structural standpoint to the home.

Q. The damage to the walls that you're referring to there, The—is that what appeared to you to be damage due to storm surge?

A. I thought so. Typically, if it were wind, you would have one wall that would kind of be pushed in and one that would be pushed out. But I thought it was all storm surge.

Q. Okay. You then say there was moderate damage to roofing from wind and minor interior damage from water to the ceilings. Is that your description of the covered wind damage in the home?

A. Yes, it is.

Q. Okay. Now, go to the next section where it says Coverage C. What is Coverage C?

A. The contents in the home.

Q. And you indicate there was no damage to contents from wind.

A. Correct.

Q. And how did you make that determination?

A. The amount of water that it looked like entered the home, the flood line was clearly above where most of the contents or all the contents would have been, I thought.

Q. So, was it your impression that the damage to the contents was due to flooding and storm surge and not wind?

[390] A. Correct.

Q. Okay. Now, I need to ask you about this next section that says "Suggested Reserve" where if you add it up, it's about $450,000. In saying that in your report, are you saying that's what you think the covered damages are?

A. No, I'm not. We had been instructed to set reserves based on what the maximum amount of damages could have been from both peril—any peril. We were not told to reserve things based on solely what we thought the damages were.

Q. So, you weren't telling Lexington that there was $450,000 worth of wind damage, were you?

A. No. And if you read the comment below it, actually Lexington had told us how they wanted their claims reserved. I was just following their policy.

Q. The damages that you thought were due to wind are what is contained when we get to the estimate?

A. Correct.

Q. Now, you have a section called "Cause and Origin" where you say: "Tidal surge from Hurricane Katrina caused extensive damage to the home. Winds from Hurricane Katrina caused moderate damage to the home." Is that just—was that what your impression was?

A. It is. Under that section, they basically wanted you to give them a thumbnail sketch of what you think the damages were caused by.

[391] Q. All right. If we can move to the next page.

(Brief pause.)

Q. There's a section here that says "Experts" where you say none were needed, all damage was clearly identifiable, and from Hurricane Katrina. Now, why did you at that time say that no experts were needed?

A. At that time, from my opinion, I thought the damages were pretty clearcut as to what was wind, what was water. I didn't think there was any real issue, and I didn't see that any of the damages were

caused by Ivan, et cetera. It looked to me like those repairs had been done.

Q. Okay. Did it seem obvious to you that there was—the destruction was due to storm surge, and there was minor damage due to wind?

A. Yes, sir.

Q. And if we could go then down to—two more pages down.

Is this a summary of the dollar value of your estimate of damages?

A. Yes, it is.

Q. And you estimate the damages to the property being 11,000, and is that your estimate of wind damage?

A. It is.

Q. And you made an estimate of $11,918.43?

A. Yes, sir.

Q. And then you show that the deductible was $19,020?

[392] A. That's correct.

Q. So, based upon your initial evaluation and estimate, the wind damage did not exceed the deductible; is that correct?

A. That's correct.

Q. Okay. And then if we go to the pages that are behind it, it will tell us the backup and the details of, you know, how many square feet of wall you thought needed to be replaced and roofing material and that sort of thing?

A. Correct.

Q. I also note—if we can go back to that page we were just on—that you say the replacement cost of the loss is $11,918.43, and you say that that same amount for the actual cash value; is that correct?

A. That's correct, since it was a simplified estimate.

Q. You took no depreciation?

A. Since it was less than the deductible, it was a moot point. So, no, I did not.

Q. Okay. All right. If we can move to Exhibit 32, which I believe is a joint exhibit previously—I believe that's a joint exhibit previously introduced.

THE COURT: And it's not on the list.

MR. SIEGEL: Okay. Then I think it's probably because—I think it's Plaintiffs' Exhibit, and we will withdraw our objection to that.

THE COURT: All right. It's admitted.

[393] MR. PREIS: No, sir, that's not—

THE COURT: That's not right?

MR. PREIS: It hasn't been admitted yet.

THE COURT: Okay. Is it your exhibit that Defendant objected to?

MR. PREIS: No. It's his exhibit.

MR. SIEGEL: All right. Well, then I'll go through it then, Your Honor.

THE COURT: Okay.

BY MR. SIEGEL:

Q. Let me ask you what this—what this document is, sir?

A. It's a report issued on the—second report issued on the damages, or third, actually, it says.

Q. And what's the date of the report that is issued?

A. I think it's at the bottom, 12-15-2005.

Q. Okay. There's a section that says "Origin"?

MR. PREIS: You want to move to admit it?

MR. SIEGEL: Sure. Your Honor, in connection with his testimony that it is his report of the—his second report based upon the work that he did, I would offer, introduce, and file into evidence Exhibit Number 32.

MR. PREIS: Your Honor, we would object for the reasons we previously briefed to the Court, recognizing what the Court's ruling is on the issue, that—do I need to—

THE COURT: Well, are you satisfied as to the [394] grounds for the objection have been established on the record previously?

MR. PREIS: Yes, sir, for the reasons that we stated before, under Rule 701 and 703, that it would be hearsay, and it's—or in the alternative, because of the fact that he hasn't been qualified as an expert, we would object to both his testimony and the introduction of the expert report.

THE COURT: All right. Objection overruled. The document is admitted.

(Joint Exhibit Number 32 was received in evidence.)

BY MR. SIEGEL:

Q. Thank you. You again repeat the origin; is that correct?

A. Correct.

Q. Where you say that the winds from Hurricane Katrina did moderate damage to the insured's home. The wind damage was primarily limited to the roof. And then you say storm surge totaled the home in all likelihood?

A. Correct.

Q. And was that your impression based upon your years of experience and training?

A. Yes, it was.

Q. Now, I notice in the "Adjustment Remarks" section, you are now recommending that Lexington retain an engineer to verify your findings?

[395] A. Yes.

Q. Why did you recommend it this time when in your earlier report you said no experts are necessary?

A. The insured and I had spoken on several occasions, and he had a concern that maybe some of the damages were from flood or that weren't included in my report and was looking possibly for some additional settlement. So, to give him the benefit of the doubt, I wanted to bring an engineer in to make sure that they agreed with my findings.

Q. Did you 'think that your report and your evaluation that the destruction of the home was due to storm surge was accurate?

A. I did.

Q. But since you're not an engineer, you thought it was appropriate to have an engineer retained?

A. I think so. And I don't think it ever hurts to get a second opinion as well.

Q. Okay. Now, if we scroll to page eight of this report.

(Brief pause.)

Q. That's it. You show the total before taking out the deductible of $72,155?

A. Correct.

Q. And that's certainly more than the amount that you had calculated in the—in your first report; is that right?

A. It is.

[396] Q. Can you explain why it's different?

A. Well, there were—you know, there are a couple of little minor things in there, but the majority of the

difference is in two areas. A contractor had been retained, so in that situation, overhead and profit is owed. So, that would be ten percent overhead and ten percent profit, so that would raise the estimate by 20 percent.

Q. And then to your knowledge, who retained the contractor?

A. Mr. Preis.

Q. Okay.

A. And then the other thing was there was cleanup for the demolition. They had presented an article from the County saying that they were going to have to demolish the structure, so I included the demolition in this estimate.

Q. Now, did you think that the home needed to be demolished due to winds?

A. No, I did not. My logic on that was that if you took a hundred percent of the sum of the damages to the home, wind may have been a small percentage, but it still was a percentage of that damage. So, I thought we owed the demolition as well under the policy.

Q. And did you do that, again, to give the benefit of the doubt to Mr. Preis?

A. I did.

Q. But if the reason why the home needed to be demolished [397] was storm surge and not wind, then would that be covered under the policy?

A. You know, that's a debate that could certainly be argued, and there are a lot of people who would tell you, no, they didn't think so. Again, I tried to give him the benefit of every doubt.

Q. Okay. And then if we can go to Exhibit 31.

(Brief pause.)

Q. Is this your final report (indicating)?

A. It appears to be.

Q. And I believe it is dated July the 5th of 2006?

A. I haven't seen that date yet. That's what I was wondering, so I can tell you for sure.

Q. And just scroll down just to see the date. I think it's on the next page.

A. It is, yes.

MR. SIEGEL: Okay. And Your Honor, for the same reasons that we offered to introduce his other work product into evidence, we would move and offer and file and introduce into evidence Exhibit 31, which is third and final report.

THE COURT: Same objection?

MR. PREIS: Same objection.

THE COURT: All right. Overruled. Exhibit 31 is admitted.

[398] (Joint Exhibit Number 31 was received in evidence.)

BY MR. SIEGEL;

Q. What I'd like to do is go to page ten of that report, and really focus on the bottom of page ten.

(Brief pause.)

Q. Here you have a subtotal of $83,187.86 before counting for the deductible; is that right?

A. Correct.

Q. And that's about nine or $10,000 higher than the estimate that you gave in December of 2005. Can you explain what accounts for that increase?

A. Primarily what had happened was the engineer we talked about earlier had gone out, he had found, he thought, some damage to some windows. Those—the damages to those windows are what makes up the difference in that amount.

Q. And are you talking about the windows on the second story of the home?

A. Correct.

Q. And we've seen a video after—have you seen the video of the—tape done by the Preises within a couple weeks of the storm?

A. I have.

Q. And have you seen that those windows, in fact, were in place after Hurricane Katrina?

[399] A. I remembered them being that way, yes.

Q. And based upon your personal observation not only from the video but from when you made your inspection, were those windows there at the time of Hurricane—after Hurricane Katrina?

A. Yes.

Q. Okay. So, if Lexington doesn't owe for those windows because they weren't damaged in Hurricane Katrina in terms of the damages that you believe are fairly and appropriately due to wind, we would go back to your second report?

A. Correct.

Q. And just scrolling down to the next page now, after you reduced the deductible, the number in July of '06 was $64,167.85; is that right?

A. That's correct.

Q. And if we could go back for a second to Exhibit 32, and go to the last page of that exhibit.

(Brief pause.)

Q. If we—again, once we take out the deductible, the amount of wind damage that you calculated was $53,135.96?

A. Correct.

Q. Now, did you send Mr. Preis a proof of loss and offer to pay that amount?

A. No. As an independent adjustor, that's not my role.

Q. Did you recommend to Lexington that they do that?

[400] A. Yes, I did.

Q. And to your knowledge, did Lexington do that?

A. As far as I know.

Q. Now, that $53,000 number, if the $45,000 for demolition were not due to wind, then we would have to reduce that $53,000 by $45,000; is that correct?

A. Correct.

Q. And we would come up with roughly $8,000 after the—after taking out the deductible?

A. Correct.

Q. Or approximately $27,000 as a gross loss before removing the deductible?

A. Correct.

Q. Mr. Clark, do you believe that you fairly adjusted this loss?

A. Yes, I do.

Q. And do you believe that you adjusted this loss in a manner giving the benefit of the doubt to the policyholder, Mr. Preis?

A. I always try to do that on every claim.

MR. SIEGEL: Okay. Thank you. No further questions.

THE COURT: All right. Ms. Milam?

CROSS EXAMINATION

BY MS. MILAM:

[401] Q. Good afternoon, Mr. Clark. My name is Shelley Milam. I represent Mr. Preis in this matter. I just have a couple of questions for you quickly, okay?

A. Sure.

Q. How many claims do you evaluate for Lexington on a yearly basis?

A. That number would fluctuate because of the fact some years there are more claims out there; some years there aren't. And Reed, Jones recently started doing work for Lexington. But to give you an answer, say, for the last three years, which would be the only answer I could probably give you, 40 to 50, I would guess.

Q. A year?

A. That's correct.

Q. About how many Katrina claims did you adjust for Lexington?

A. That was a high year, and I'm—again, this is not exact, a hundred to a hundred and twenty-five, probably.

Q. Did you talk to anybody in regards to your testimony today before you came here?

A. I met with Mr. Siegel because he wanted to discuss what we were going to do, yes.

Q. But you didn't speak with me or Mr. Preis before today, did you?

A. No.

[402] Q. You just met with Lexington's attorneys; is that correct?

A. Correct.

Q. Did you perform any math calculations to determine the amount of wind damage to this house?

A. I wrote an estimate on it, yes.

Q. Did you prepare any math calculations to determine the amount of flood damage to this house?

A. No. That was done by the flood adjustor.

Q. Let me ask you this: When you prepared your calculations on wind damage, did you plug them into a computer program or were they site specific to the Preis home?

A. They're plugged into a computer program.

Q. And is that program based on average cost of homes throughout the United States?

A. No. It's zip code based specifically for the zip code of the home that's—that you're writing the estimate on.

Q. So, it's based on an average within that zip code; is that correct?

A. That's correct.

Q. But it's not specific to that specific home and that specific property?

A. Well, yes and no. And here is the reason I say that: There are quality settings on the particular estimate that you can change, be it a custom home or be it a normal home or what they call a premium home. But no, it is not specific in terms [403] of an actual dollar-for-dollar change.

Q. It's just an average?

A. For that quality of a home, yes.

Q. And you just plug those numbers into that program, and it will just split it out for you?

A. It's not quite that simple but, yes, it does do that.

Q. Okay. You talked about damage to windows earlier, and you had adjusted your report, I believe, your final report to reflect that damage. Hypothetically, Mr. Clark, if windows blew out in this house, would you consider that contents would have been damaged?

A. Hypothetically speaking, if you came to a home where windows had been blown out, I think that was a possibility. You'd look for actual damage—

Q. But what if a whole wall of windows was blown out, would you consider that contents would have been damaged?

A. If there were contents in close proximity to those windows, I would think so.

Q. What about if a roof lifted up, would you have considered contents would have been damaged?

A. You'd certainly look for it just, you know, make sure that did happen.

Q. Let me point you to Exhibit 31. And you explained on Exhibit 2, which was your initial report, I believe—well, we can start with Exhibit 2 if you don't—so we don't get [404] confused.

THE COURT: 2 or 32?

MS. MILAM: Exhibit 2 was previously admitted into evidence. It's also the same, Your Honor, as Exhibit 33, I believe. Its a duplication.

THE COURT: Okay.

MS. MILAM: It's the first report of Mr. Clark.

THE COURT: Okay.

MR. SIEGEL: Your Honor, we introduced 33 instead of 2 because Number 2 was not a complete copy of that exhibit 33 is a complete copy of that—of his report.

MS. MILAM: So, either way, we can look at either one. We can look at 33.

BY MS. MILAM:

Q. We're going to scroll down. Mr. Clark, is it true that you set the suggested reserves in this case?

A. I don't actually set reserves. As an independent adjustor, I'm just making a recommendation.

Q. Okay. But did you recommend to Lexington Insurance that they set the reserve on Coverage A at $300,000 and Coverage C at a hundred and fifty thousand dollars and expenses at $2,500?

A. Based on the guidelines Lexington had given us, yes, I recommended they set—

Q. Those are your recommendations?

[405] A. Yes.

Q. And you could have recommended them to be lower; is that correct?

A. Not based on their guidelines, no.

Q. So, you had to set these reserves this high?

A. Our instructions on reserves were to set it to potentially cover all of the different exposures that were out there. So, wind would be an exposure, water would be an exposure, et cetera. So, you could have other things in there.

Q. Okay. But let me ask you this question: Did you believe that Lexington's exposure in this case at this time was $450,000?

A. What I set that based on was the fact that flood coverage was "X" amount of dollars. Lexington's coverage was roughly $650,000 through coverage limit. So, after deducting the potential flood coverage from their wind policy, it came up to that $300,000. And again, those are approximates, not—

Q. Okay. Let me point—let me go down in this document before we leave this document. At the bottom, you testified that you did not assign depreciation because it was lower than the deductible; is that correct?

A. That's correct.

Q. Okay. If we could flip to document number—to your final report, which I believe is Document 31. Is this your [406] final report, Mr. Clark?

A. I need to see the date to tell you for sure.

Q. Okay. Let me—I'm sorry, we flipped too quickly.

A. Yeah. It's 7-5—yes.

Q. Okay. This is your final report?

A. Yes.

Q. Can you show me on this document where you took depreciation?

A. I do not see it.

Q. But this amount at the bottom of $63,554, that is above the deductible, is it not?

A. It is.

Q. And why was depreciation not taken?

A. At this point in time, there were a lot of things on there that I didn't think warranted the depreciation. For example, if you are repairing something versus replacing something, you don't depreciate it. So—

Q. But you didn't take depreciation on the actual cash value

MR. SIEGEL: Your Honor, I object. He wasn't finished with his answer.

THE COURT: Yeah. Allow him to answer the question fully. Go ahead, Mr. Clark.

A. If you are repairing something versus replacing it, for example, on the roof, or it was not going to be a total [407] replacement, it was just going to be repaired, you are not going to depreciate it.

If you were looking at the cost of the demolition, for example, that's an incurred cost. That's not something you are just going to theoretically do, so that wouldn't be appropriate for depreciation. So, there wasn't a whole lot of things on there that I thought was appropriate for depreciation.

BY MS. MILAM:

Q. Okay. But you didn't take depreciation on any amount of that, did you?

A. No, I did not.

Q. Okay. Mr. Clark, I'd like to show you what was previously labeled as Exhibit 32.

MS. MILAM: But I'm not sure it's been admitted into evidence, Your Honor, because the Defendants had an objection to it.

THE COURT: It has been admitted.

MS. MILAM: Okay.

BY MS. MILAM:

Q. Mr. Clark, would you please read that second sentence under "Adjustment Remarks"?

A. It starts out: "I would strongly"?

Q. It starts out with: "I would strongly recommend"?

A. Yeah. "I would strongly recommend your retention of an [408] engineer to verify my findings —"

THE REPORTER: Excuse me. Excuse me. Could you slow down, please?

THE WITNESS: Sure, no problem.

A. "I would strongly recommend your retention of an engineer to verify my findings, as this could be an active file."

Q. So, you're not an expert in the field of engineering; is that correct?

A. No, I'm not.

Q. And you felt like you needed an engineer to verify your findings; is that correct?

A. I thought that was appropriate.

Q. And do you know whether Lexington Insurance over hired an engineer before they offered Mr. Preis $63,000 for his repair of his home?

A. Being the independent and being in the field, I have no idea.

Q. But they didn't hire an engineer while you were employed for Lexington to adjust this claim, did they?

A. If they did, I was never notified they did.

Q. Have you ever reviewed Lexington's claims procedures and policies?

MR. SIEGEL: Your Honor, may we approach, please?

(Sidebar conference, on the record:)

THE COURT: Yes, sir.

[409] MR. SIEGEL: The allegations of bad faith in this case have been dismissed. And I think that this testimony that's trying to be adduced is to try to show Lexington as you might try to do in a bad faith claim and is irrelevant to the issues that are before this jury and is more prejudicial and probative, and we would object to any testimony along these lines.

THE COURT: Okay. Ms. Milam?

MS. MILAM: Your Honor, the—well, this is for impeachment purposes only. And the witness has testified that he made an analysis of the amount of wind damage, but he also presented Lexington guidelines adjusting this claim which required an engineer to be retained for any wind versus water issue. It goes to the relevancy of whether or not this claim was properly adjusted and whether or not the amount of wind damage was properly evaluated in this case.

MR. SIEGEL: The evidence in the case, Your Honor, is that an engineer was retained, and he's testified all day today. In fact, he was retained before Mr. Clark issued his final report. And Mr. Clark testified that he made some modifications to his numbers based upon the engineer's evaluation. And this

is not impeaching anything that this witness has said.

THE COURT: Yeah. How is it impeachment of this witness?

[410[MS. MILAM: Well, Your Honor, I think it goes to the issue of whether or not the claim was adjusted properly as to the amount of wind damage on the house. And if he felt that he did not have the qualifications or abilities to specify that, he would have never recommended an engineer being retained.

MR. SIEGEL: He's already provided his testimony in this regard, and this is a last ditch effort, my opinion, to bring in something highly prejudicial with little or no probative value.

THE COURT: Yeah. Objection sustained.

(In open court.)

BY MS. MILAM:

Q. Mr. Clark, could we look at Exhibit 51, previously admitted to the record?

A. Okay.

Q. And I'm going to ask you to identify this document.

THE COURT: Ms. Milam, that has not been previously admitted.

MS. MILAN: 51?

BY MS. MILAM:

Q. Okay. Mr. Clark, will you please identify this document?

A. Is that the one that's in front of me now?

THE COURT: No.

THE REPORTER: I'm sorry, I didn't hear your answer.

[411] THE WITNESS: There's nothing in front of me at the moment.

BY MS. MILAM:

Q. Did you prepare this document?

MR. SIEGEL: Your Honor, I think this is the same as Exhibit 32 that is admitted into evidence.

THE COURT: Okay.

A. Certainly appears so, yes.

BY MS. MILAM:

Q. Okay. We'll move on. Okay. If you would look, Mr. Clark, please, under your "Recommendations, Future Activities".

A. Hold on a second. We lost it again.

(Brief pause.)

Q. I can put it on the Elmo if that helps to be quicker. Would you please read that sentence that I've highlighted?

A. "As previously recommended, please set your reserves at the policy limits for all relevant coverages."

Q. And what was the relevant coverages in this policy? They're listed right there?

A. Coverage A, B, C and D.

Q. Okay. And is it correct that the relevant policy coverage was right at a million dollars?

A. If you're totalling them all up, yes.

MS. MILAM: Thank you, Mr. Clark. I have no further [412] questions.

REDIRECT EXAMINATION

BY MR. SIEGEL:

Q. Mr. Clark, Ms. Milam asked if you ever met with Mr. Preis or Ms. Milam before testifying in trial today. Remember that question?

A. I do.

Q. Did either Mr. Preis or Ms. Milam attempt to contact you?

A. No, only during the course of the claim itself.

Q. Before litigation was filed?

A. Right.

Q. And did you speak with them before litigation was filed?

A. Yes.

Q. But in preparation for your testimony here today, did either one of them even try to give you a call to talk to you about your testimony?

A. No.

Q. Did they ever ask for your deposition?

A. No.

Q. Did they ever subpoena any of your records?

A. No.

Q. Now, Ms. Milam asked you questions about the suggested reserve, and you explained what that was. And my question for you is, when you made a suggested reserve, you were including both covered and non-covered items?

[413] A. Correct.

Q. And that was not your recommendation as to what the covered wind damage was, was it?

A. No. We were instructed that if the home appeared to be a total that we were supposed to set the reserves at the policy limits.

Q. And the covered wind damages that you estimated, were those based upon the reports, the middle one being net of deductible $53,000?

A. Correct.

Q. And if we take out the demolition net of deductible, it's about $8,000?

A. Correct.

Q. Now, Counsel questioned you about contents. Did you make an evaluation as to whether there were any contents damaged by wind?

A. Yes, I did.

Q. And what was your estimation?

A. As my report said, I didn't feel there were any contents damaged by wind.

Q. Did you make an estimation as to --

A. With the exception of the stuff estimated, if there were any. I don't believe there was.

Q. And if I ask you to assume there was nothing estimated due to wind, would that then mean that you made the [414] determination that there were no contents damaged due to wind?

A. Correct.

Q. Did you make an estimation as to what did damage the contents?

A. Tidal surge and flood.

Q. Now, by the time you issued your final report, Lexington had followed your recommendations and retained an engineer; is that correct?

A. That's correct.

Q. And did the engineer for the most part verify your impressions?

A. He did. He did. The only thing that I remember being changed was the windows we've discussed.

Q. Okay. And who is the engineer that Lexington retained?

A. I think that was PTC, I believe.

Q. Van Fisher?

A. Yes.

Q. Okay. Have you ever met Mr. Fisher before?

A. No.

Q. Now, Counsel asked you questions about depreciation, and you said that depreciation isn't applicable on repairs or labor; is that right?

A. Correct.

Q. The damages that you were estimating for the wind-only damages, for example, a roof, if that's all the damage there [415] was, could that be repaired?

A. Yes, it certainly could have been.

Q. And on repairs, do you calculate depreciation?

A. No.

Q. And is anything less than full replacement, is that repairs?

A. Correct. That's essentially what you are—a repair is something other than full replacement. That's a good definition.

Q. So, hypothetically, had a tornado hit this house and blown it to smithereens, which we know did not happen, but had that happened and you were doing a replacement estimate, then you would have included depreciation?

A. Correct.

Q. But there was no need to do that because the wind did not destroy the house?

A. Correct. And if we had been replacing the entire roof and not just a section of it, I would have included depreciation on it.

MS. SIEGEL: Okay. Now, one second.

(Brief pause.)

MR. SIEGEL: Would you go to Exhibit 22, please.

(Brief pause.)

MR. SIEGEL: This is an exhibit that's been previously introduced into evidence. And if we could go to [416] the second page—no, I guess the first page.

(Brief pause.)

MR. SIEGEL: Strike that. No further questions.

THE COURT: All right. You can step down. Thank you.

THE WITNESS: Thank you.

THE COURT: Anything further?

MR. SIEGEL: No, sir. The Defense rests.

THE COURT: Plaintiff have any rebuttal?

MR. PREIS: No, sir.

THE COURT: No?

MR. PREIS: Plaintiff rests.

THE COURT: Okay. All right. Ladies and gentlemen, all sides have rested in this case. What that means is that you've heard all of the testimony and you've seen all of the exhibits that are going to be admitted in this case.

What's left in this case is for me to meet with the attorneys to talk about the jury charges, for the attorneys to prepare for their closing arguments, for you to hear their closing arguments, and then for me to charge you on what the law is in this case.

That will take approximately a couple hours time, which means we probably can't do that this afternoon and try to finish the trial this afternoon. So, it's going to require that we come back tomorrow morning.

[303] there was a small amount of damages, and we did put on evidence of the actual cash value of those damages. It was the same as the replacement value. The RCV and the ACV was the same because when dealing with repairs, you don't take depreciation. So, RCV and ACV are one and the same. So, we did put on evidence of what the ACV of the damages caused by wind were at the time of the loss.

And in terms of our motion for a Rule 50 motion for a judgment as a matter of law, we believe that Plaintiffs' burden not only on contents but on the structural damage as well as stated in the Broussard case is that the Plaintiff has to prove—before any burden shifts to the Defendant, the Plaintiff has to prove not only the direct physical loss, but he also has to prove the covered damages and the amount of covered damages.

The Plaintiff offered no evidence to do so. The Plaintiffs, all of their witnesses, their expert engineer, and their contractor expert both agreed that they did not segregate—they both agreed that there was wind and water damage to this property, and they both agreed that they did not segregate the damages between the two.

So, under the applicable law, the Plaintiffs have not met their burden, and this case should be dismissed in its entirety.

THE COURT: Mr. Preis?

[420] MR. PREIS: Your Honor, we come back to the difference between an all-risk policy and an all-perils policy, and that's the distinction that Counsel doesn't want to make in the case. And his statement of the law if it was a perils policy is 100 percent right. Its just that this is an all-risk policy, and the endorse-

ment makes the all-risk coverage subject to A, B, and C. And the law is clear that when you have an all-risk policy, it covers all risks unless the insured is able to prove that the exclusion is applicable to it. I mean, that is the difference between a perils policy and an all-risk policy.

MR. SIEGEL: And Judge, I know you've heard a lot of argument on this, so this will be my final comments, I think. The Broussard case does not make that distinction between an all-risk policy and a perils policy. It's a distinction without meaning. All the Broussard case is is that an action on an insurance policy, a first party insurance policy, it says what the Plaintiffs' burden is.

And it's important that they quote from Couch on Insurance, the 2006 edition of Couch on Insurance: "It is an insured's burden to produce evidence that would afford a reasonable basis for estimating the amount of damage or the proportionate damage caused by the covered peril and that by the excluded peril."

And that's what the Plaintiffs failed to do and why our [421] Rule 50 motion should be granted.

THE COURT: All right. Anything further with regard to the JMOL?

MR. SIEGEL: No, sir.

THE COURT: Okay. Let's take a break. It's about 3:15. And what I propose to do is rule on the motions and to present to you a proposed jury charge, and we'll allow you some time to look at that and we'll get back together at a charge conference this afternoon sometime. But let's take a break for about 15 minutes, and then we'll get back together.

MR. SIEGEL: Thank you, Your Honor.

(Brief recess from 3:00 p.m. until 3:20 p.m.)
(The Parties present with Counsel.)
(Proceedings resumed.)

THE COURT: All right. I have considered all of the matters presented to the Court at the close of the Plaintiffs' case, at the close of Defendant's case, and at the time of both sides resting in this matter. I've considered the written briefs of the Parties as well as all the oral argument.

And as I appreciate the issues here, the motion initially by the Defendant in this case as amplified by oral argument presents two matters: One, that the Plaintiffs failed to present sufficient evidence segregating the amount of damage caused by wind from the amount of damage caused by flood; and [422] two, that the Plaintiffs failed to present evidence of the actual cash value of the damaged property. That's how it was initially presented to the Court.

As I understand the Plaintiffs' argument, Plaintiffs argue that they have no burden to prove the amount of damages caused by wind as opposed to flood and, in fact, the proposed jury instructions submitted by the Plaintiff on this score recites, and I quote: "It is not the Plaintiffs' burden to prove the cause of loss," end quote. However, despite multiple directions from the Court to provide legal authority for all proposed charges, and despite even a second opportunity to do so, the Plaintiffs have provided no legal support for that position except an interpretation of the Broussard case to some extent, which I'll address here in just a minute.

During oral argument, the Plaintiff has offered only the agreed proposition that the Defendant bears

the burden of proving that a loss comes within a policy exclusion. The question, however, as I see it, is not whether the Defendant bears that burden but what the Plaintiffs must show before the burden is activated.

As reflected by the authority submitted by the Defendant, when a covered peril, in this case, wind, and an excluded peril, in this case, water, both contributed to the loss, and I believe the Plaintiffs admit that this is such a case, the [423] burden is on the Plaintiff to show not only a loss to covered property from a covered peril but, quote, "the amount of segregable damage caused by the covered peril." And that's a quotation from Broussard, noting that the Broussard case, which is a very current, a very recent case, also cites Couch on Insurance, which we discussed yesterday. And the provision that it cites is, and I'll quote: "It is an insured's burden to produce evidence that would afford a reasonable basis for estimating the amount of damage or the proportionate part of damage caused by the covered peril and that by the excluded peril," end quote.

Based on the authorities directly on point, that being the Broussard case, and the Plaintiffs' failure to produce any inconsistent authority, the Court concludes that the Plaintiffs bear the burden of presenting evidence sufficient to provide the jury a reasonable basis for separating the amount of damage caused by wind from that caused by flood.

The question becomes whether they have done so. And I will examine the damage to the house and the damage to the contents separately so that we are clear as to what the Court's ruling is as to each of those issues.

First, construing all of the evidence and inferences favorably to the Plaintiffs, they provided evidence through Mr. Sealy, Mr. Purvis, and the City of Fairhope's letter from which a reasonable jury could find that wind caused the two [424] walls to collapse and that, but for the collapse, the house would not have been required by the City to be demolished. Under this view of the evidence, wind caused the entire loss to the house and thus all the damages to the house beyond those paid for by the flood insurers.

With respect to contents, however, the Plaintiffs have not identified any evidence that affords the jury a reasonable basis for separating losses due to wind from losses due to flood. As 1 understand the Plaintiffs' argument, you suggest that the jury can simply award the Plaintiffs for all lost contents not paid for by the flood insurers up to policy limits.

While this is a convenient mathematical calculation, it is not evidence of what damages to contents were actually caused by the wind. The only evidence of causation the Plaintiffs suggest is that rain could have entered the house through the openings left by the falling walls and, as we know from the policy, damage caused by rain coming through an aperture created by wind is covered.

The trouble is that the Plaintiffs provided no evidence that rain from these openings impacted any rooms other than the master bedroom and the office; and even as to those rooms, they provided no evidence affording a reasonable basis to conclude that any particular item was either soaked by rain or ruined thereby. Accordingly, with regard to the JMOL filed by [425] the Defendants with regard to the contents loss, the motion is granted.

Next, the Defendant appears to argue that in order to create a jury issue as to actual cash value of the house, the Plaintiffs must present testimony of a witness announcing such a value in dollars and cents. However, Defendants cite no authority for such a position, and it is not unusual to extrapolate a value for property using other evidence.

In this case, the Plaintiffs provided Bill Purvis' estimate that it would cost $1,028,000 to replace the house that was demolished, and there is other evidence from which the jury could conclude that no depreciation should be found.

Accordingly, for the reasons articulated on the record, the Defendant's judgment as a matter of law is granted with respect to the Plaintiffs' claim for insurance benefits on contents and denied with respect to their claim for insurance benefits on the house.

With those rulings made, I am prepared to present the proposed jury charges which will track the rulings of the Court and set this case up for presentation to the jury, and we'll pass those out. And I'm going to—what I'll do is give you half an hour or so to look over those. For the most part, you'll see that those are pretty much the agreed charges. There are some additions or changes that we've made that we'll need to discuss, I suppose.

[426] But before we have our charge conference, I want to be clear about the Parties' position on submitting to the Court the setoff calculations that you indicated that you wanted the Court to do. And as I understand it, you are asking not the jury to determine that issue but to have the Court, based on the jury's verdict, to make certain setoffs or certain adjustments to the amounts paid on the flood

coverage. And I want to be clear as to what potential adjustments are out there, and I want to be clear about what the amount of the adjustments are or whether there's a formula that can be applied.

And I do this out of caution because I was asked to do this in another case, and we ended up with more litigation after the fact than we had before the fact because it was impossible to determine what adjustments applied or what formulas applied, and we went round and round with motion play, and it took months and months to figure this out.

So, I don't know that—you may be prepared to do that now. If you are, fine. If you want to look at the jury charge to see if that impacts any of that in any way, you're welcome to do that. I'm more than happy to wait another half hour to get that on the record, but I just want to be sure that we're clear as to what you're asking me to do.

MR. SIEGEL: Judge, I think it would be a good idea for us to look at the jury charges and maybe even Counsel to [427] confer.

THE COURT: That will work. So, if—yes.

MR. PREIS: I just had one three months ago on the same issue.

THE COURT: Yeah. These are—it creates difficult issues. And having been there before, I don't want to go again. So, if you need less than 30 minutes, fine, let me know. Just let Melanie know and we'll get back—

MR. PREIS: Could I do a housekeeping matter right quick?

THE COURT: Sure, absolutely.

MR. PREIS: Your Honor, we went through the exhibits with the Clerk. And just so the record is complete, Mr. Siegel and I jointly move so the record is complete to put in Exhibit 5, 20, and 46 into the record without objection.

THE COURT: All right. Those are admitted.

(Joint Exhibits Numbered 5, 20, and 46 were received in evidence.)

MS. MILAM: And Judge, also Exhibit 51, Mr. Siegel—we thought it was a duplicate and, in fact, it's not a duplicate. So, we have no objection to admitting it, and I don't believe the Defendant does.

MR. SIEGEL: Your Honor, I have no objection to any of the exhibits that they've mentioned at this time.

THE COURT: All right. That's admitted as well.

[428] (Joint Exhibit Number 51 was received in evidence.)

THE COURT: All right.

MR. PREIS: Judge, what about the—will one exhibit book go to the jury, or what should we do on that?

THE COURT: Well, Melanie, have you received all the exhibits or just references to them?

THE CLERK: Just references.

THE COURT: Okay. I'll leave it up to the attorneys to marshal the evidence, make sure that only those exhibits that have been admitted go to the jury. And you can put it in a book or you can just put them in loose-leaf form if you want to. I don't care as long as

only those exhibits admitted go to them. So, I'll leave that up to y'all to work that out.

Anything further?

MR. PREIS: No, sir.

(Brief pause.)

THE COURT: David points out to me that the Plaintiffs have also made a motion for a directed verdict. I think it's incorporated in what I've just said here. To the extent that it's not, then the Plaintiffs' motion is denied.

MR. SIEGEL: Your Honor, the only other point, and maybe this is a jury charge issue, with Your Honor's ruling, and since there has been discussion before the jury about the contents claim, I think we need to make sure we incorporate [429] that somehow in the jury charge so the jury understands they are not making any decision with respect to contents.

THE COURT: Y'all talk about it, and if there's some way to do that, some easy way to do it, I'm more than happy to consider it. So, talk about that as well.

All right. We'll see you in about half an hour then.

(Proceedings adjourned from 3:30 p.m. to 4:00 p.m., then resumed.)

(Parties present with Counsel.)

THE COURT: All right. Which order would you prefer to go? We need to talk about the Court's responsibilities under the Parties' setoff proposal or the jury charges first?

MR. PREIS: Let's do it the other way.

THE COURT: Jury charges, we'll talk about those first?

MR. SIEGEL: I'll take it either way, any way Your Honor—

THE COURT: Okay. Well, to the extent that it might affect the jury charge, I don't think it will, but let's go ahead and talk about jury charges then, if you want to.

All right. What says the Plaintiff?

MR. PREIS: Your Honor, we're happy.

MR. SIEGEL: And Judge, my comment on the jury charges—jury instructions are twofold: First of all, what we talked about earlier is I think there needs to be some [430] instruction to the jury about that they're not going to be deciding the contents claim.

THE COURT: How about if we take that out of—on page seven, it doesn't—it's not a direct comment about it, but it removes—

MR. SIEGEL: Judge, the Parties have agreed to some language. We've discussed it, and what we thought is that there would be an instruction that says that the Court instructs you that the issues concerning contents have been resolved, and you are not to make any award for damage to contents.

THE COURT: All right. You want that included in an appropriate place in the written charge then, say, at—have you proposed as to where that—have a proposal as to where it should go, or do you want to just find a good place for it? My suggestion would be page seven when we talk about the section—

MR. PREIS: I would say—you see after the exclusion for water damage?

MR. SIEGEL: Yeah. I would say that same place where you have—actually where you have a little space. It looks like you have an extra space before you get to the it is the insurer who bears the burden.

THE COURT: What page?

MR, SIEGEL: I'm sorry, page seven.

[431] MR. PREIS: Page seven, right there in that space.

MR. SIEGEL: Right in advance of the last paragraph.

THE COURT: You got it? Okay. You know what the proposed language is sufficiently? Okay. All right.

MR. SIEGEL: And then my other point, Judge, is that when talking about the burden of proof in these jury charges, Your Honor just issued a ruling on the judgments as a matter of law as to what the Plaintiffs' burden of proof is, but that ruling is not carried through into these jury charges.

And in particular, what I would submit is we did propose the substitute jury charge to the Court, first in blank and then in print, that I think should replace the charge that we had asked for since it is consistent with Your Honor's ruling and is consistent with our appreciation of what the Plaintiffs' burden of proof is.

THE COURT: Mr. Preis, response?

MR. PREIS: I think that the way that the jury instruction is written is the correct way. And I think that based upon the Court's ruling on it is is that we have met that prima facie burden even under the Court's ruling of establishing a total identifiable wind loss just based upon a prima facie case.

And I think that the instruction as written is right. I mean, there's only one—at the bottom of page seven, only one thing dealing with the burden here. And I do think that [432] everybody believes that the exclusion is Lexington's burden, the amount of water is Lexington's burden. It's just a matter of what we've got to do before they have that burden. And I think that we've met that prima facie burden.

MR. SIEGEL: And Judge, my response to that would be that the burden for proving a judgment as a matter of law is different than the burden of proof in—in the Plaintiffs' burden of proof in the case. And I think that Your Honor has read into the record what the Plaintiffs' burden of proof is, and I'm very concerned that if the jury instruction has—states the burden of proof different than what Your Honor stated in the—in the ruling on the judgment as a matter of law where you declared and said what you find the burden of proof to be based upon the Broussard case and based upon Couch that were going to have inconsistent burdens of proof in this record that might cause us problems later on. And I don't think anybody wants to retry this case.

MR. PREIS: And the only thing that I would submit to the Court is that the ruling of the Court is made in the summary judgment, and the reference to it in the motion in limine is a correct statement of Lexington's burden on the exclusion.

MR. SIEGEL: And the point of my position, Judge, is not what Lexington's burden is on the exclusion. I'm satisfied with the language as to Lexington's burden on the [433] exclusion. My point—my contest to the proposed jury instructions at this point is that it does not adequately describe the Plaintiffs' burden.

THE COURT: Any other proposed corrections or additions to the jury charge?

MR. PREIS: No, sir. I would just put just an objection on the record about the personal property being excluded from the interrogatory. That would be the only thing that I would add.

THE COURT: All right. We'll note that for the record. All right. I'll reserve ruling on the Defendant's objection with regard to the Plaintiffs' burden and resolve that before the final edition is published.

All right. Anything further with regard to the instructions?

MR. SIEGEL: No, sir.

THE COURT: How about the verdict form with interrogatories, anything?

MR. SIEGEL: The verdict form and the interrogatories, in question number two, I had submitted to the Court that the jury only had to consider the damages due to wind, and I still think that that is all that needs to be decided because that's all that's covered by the policy.

THE COURT: Well, and I considered that, but then when you suggested that the Court would be responsible for [434] determining some kind of setoff as to flood, it then seems to me it's incumbent on the jury to tell us how much that is, I mean, what it could be; in other words, to tell us how much they attribute to the—of the loss to flood so that we'll have some basis on which to set off.

How would you propose doing it otherwise?

MR. SIEGEL: Well, Judge, then I guess this is going to get us into a discussion of the setoff, so why

don't we just address that now. And what I believe is that we really can't have that discussion until we see what the jury does, particularly with the interrogatory as it's phrased, because I think that the setoff for flood becomes relevant—and I'm just picking an example. I'm not saying it's the only example. But if the jury determines that all of the damages by—they accept Plaintiffs' argument of a million and twenty-eight thousand dollars of damages and say it's all due to wind, then there will be a credit issued that we are going to have to deal with in the formulation of the judgment. If instead the—there's a different result, then we may not have to deal with a credit issue.

So, although you wanted clarity before we proceeded further, it would be my position that this is an issue that we are just going to have to deal with depending upon the verdict of the jury in the formulation of judgment phase of this case and would have to be done by motion practice at that point in [435] time.

MR. PREIS: Your Honor, our position on it is is that we're going to argue it to the jury, and we're going to tell them the credit is there.

THE COURT: You're going to tell them what?

MR. PREIS: In other words, we're going to say the total damages, just using round numbers, would be 1.1 million, and that we have received on this $1.1 million a flood payment. And so they are going to know the flood payment.

And the amount that we are going to ask for is not going to be the one-one; it's going to be what we think is the net number there.

Now, it's conceivable that the judgment can come in in excess of the policy limits. And obviously, in

that case, the Court would adjust down the judgment from the policy limit—I mean, from whatever the judgment would be down to the policy limits. But it's our position that that's the only adjustment that should take place.

MR. SIEGEL: My reaction to that is based upon Mr. Preis' view of how—what he's going to argue and what he's really saying is, Judge, you don't need to make a credit because he's going to tell the jury to already do that. But I can't at this point in time be prepared to concede that because I don't know what the verdict is going to be, and I can't make this determination until I know what the verdict

APPENDIX R

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil No.: 06-0360-WS

RICHARD PREIS and VICTORIA HEARIN PREIS,
Plaintiffs,

vs.

LEXINGTON INSURANCE COMPANY,
Defendant,

August 15, 2007
Courtroom 2a
U.S. Federal Courthouse
Mobile, Alabama

VOLUME III

CONTINUATION OF THE
JURY TRIAL PROCEEDINGS

Before The Hon. William H. Steele
United States District Judge

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[446](August 15, 2007, 9:00 a.m.) (In open court.)
(All Parties present in court with Counsel.)
(Jury not present.)

THE COURT: Y'all keep your seats. Good morning.

MR. PREIS: Judge, how are you doing?

THE COURT: How is everybody?

(Brief pause.)

THE COURT: All right.

MR. PREIS: Judge, is the language on page six the only change that was in there from yesterday?

THE COURT: Well, the paragraph just below the middle of the page is an addition which is a part of the Defendant's requested charge.

MR. PREIS: As far as the burden of damage—

THE COURT: Right. The burden is on the Plaintiffs is a change. And then on page seven, the paragraph beginning section one, we deleted the coverage sections that are not applicable and then added the agreed language as the last paragraph.

The verdict form, we made the change as indicated yesterday, which is to add the language what is the actual cash value in paragraph two.

And with those changes, are there any additional matters that we need to discuss with regard to the jury charge, Mr. Preis?

[447] MR. PREIS: Yes, sir, just in terms of formally putting on the record that the language that was added is the burden is on the Plaintiff to establish every fact in issue which is essential to their cause of action or right of recovery, including the existence of the policy sued on, its terms and provisions, that their claim is within coverage, and the amount of the covered damage.

And for purposes of the record, we object to that jury instruction as not being the law on an at-risk policy—I mean, at-risk, I'm sorry, an all-risk policy. Thank you, sir.

THE COURT: All right. Note your objection. Mr. Siegel?

MR. SIEGEL: Your Honor, obviously, for the reasons we've argued previously, I believe what you've stated there is a correct statement of the law.

And with that and the other changes, the Defendants are—have no further comments or objections to either the jury charges or the jury interrogatories.

THE COURT: All right.

MR. PREIS: And Your Honor, just where the—I said it wrong yesterday in terms of when we were talking about the jury instruction, but the interrogatory, we object to the exclusion of the personal property from the jury interrogatory. And obviously, the Court's already ruled on that, but just for purposes of making the objection, we put it

* * *

[470] pressure hurricanes on record. And the landfall was in Gulfport, Mississippi, or thereabouts, so Mobile Bay was on the east side of that where the storm surge would be the strongest. It is the storm surge, ladies and gentlemen, and not the walls—not the wind that caused those walls to fail.

Go to the next chart, please. And I think I've gone over that, but this is all of the witnesses that said that the storm surge damaged the house. Mr. Sealy agreed that there was storm surge damage.

Mr. Gibson, the representative, the flood adjustor now, Mr. Preis said he was a Lexington representative and, again, that's just not true. He was a representative of the flood adjustor. And think about this: Why would he have an interest in saying that flood did all this damage? His company that he's working for has to pay money if flood does all this damage. So, if he had an interest, he would want to minimize the flood damage, not maximize it. And what he told you on the witness stand was that he saw no wind damage. He even paid for the roof that we offered to pay for. He even paid for that roof in his flood adjustment.

Go to the next, please. It's just a picture of all the debris. And remember, if this had just been some floating debris, it would be widely dispersed and not heavily packed.

Next photograph. Same thing, all of the debris. And this is treated lumber from all of the piers. Every witness

* * *

[478] sorry, let me say that again—for wind damages, and it comes up with a balance of $963,000 due to flood.

Now, I only get to talk to you this one time. It's the last time I get to talk to you. And that's because in a civil case, and as Judge Steele will instruct you, the Plaintiff has the burden of proof. Because they have the burden of proof on most of the issues in this case, they get to go a second time. I don't get to get up, you know, and as a lawyer, you always like to get the last word in. I'm sure you've seen that already, but I don't get to get the last word in this case.

But I would ask you to do me one favor. When Mr. Preis gets up here for his extra five minutes or whatever he has left, with every point he makes, I want you to think in your mind: What would Mr. Siegel say in response?

With that, ladies and gentlemen, the case is in your hands. We trust your judgments. We thank you for serving on this jury, and I'm through. Thank you.

THE COURT: Mr. Preis.

CLOSING STATEMENT IN REBUTTAL
BY MR. PREIS

First of all, I would like to thank y'all for serving here. It's a very important function that any juror performs, but particularly on a case like this that so severely impacts the Gulf south area, and we appreciate that. Ms. Milam thanks you. Mr. Gordon thanks you. More than anything else, Richard Preis thanks you for agreeing to serve here today.

* * *

[489] defense by a preponderance of the evidence.

A preponderance of the evidence simply means an amount of evidence which is enough to persuade you that a claim, defense, or contention is more likely true than not true.

If the proof fails to establish any element of a claim, defense, or contention by a preponderance of the evidence, then as to that claim, defense, or contention, you should find against the party asserting the claim, defense, or contention.

In deciding whether any fact has been proved by a preponderance of the evidence, you may consider the testimony of all of the witnesses regardless of who

may have called them and all of the exhibits received into evidence regardless of who may have produced them.

Lexington and Mr. Preis entered into an insurance contract to provide coverage for any loss from wind on property in Alabama. The elements of a claim for breach of contract are: One, the existence of a valid, binding contract upon the parties in the action; two, the plaintiff's own performance; three, the defendant's nonperformance; and four, damage.

The burden is on the Plaintiffs to establish every fact in issue which is essential to their cause of action or right of recovery, including the existence of the policy sued on, its terms and provisions, that their claim is within its coverage, and the amount of their covered damage.